Daniel Caballero

68 West 69th Street, Apt 1A • New York, NY 10023 • 423-503-8773 • dcaballero4@fordham.edu

EDUCATION

Fordham University School of Law New York, NY
Juris Doctor Candidate, Evening Division, May 2024
G.P.A.: 3.67
Honors: *Fordham Urban Law Journal*, Stein Scholars Program in Public Interest Law and Ethics, Pro Bono Scholar, Dean's List (2020-2023), Mary Daly Scholar (as of May 2023)
Activities: First Generation Students, Latin American Law Students Association, Voting Rights & Democracy Forum
Online Publication: *The Empire Strikes Back: Legislative and Executive Silencing of Voter Discontent*, FORDHAM L. VOTING RTS. & DEMOCRACY F. COMMENT. (Mar. 16, 2023, 10:15 AM).

Wesleyan University Middletown, CT
Bachelor of Arts, Political Science, May 2015, Completed course of study in three years
Minor: Film Studies

EXPERIENCE

Selendy Gay Elsberg New York, NY
Summer Associate, Summer 2023, Permanent Offer Extended
Draft research memos on a variety of substantive and procedural legal issues. Wrote direct examination outline for key witness in upcoming §1983 trial. Drafted memo comparing witness's testimony at trial and deposition to anticipate lines of questioning by opposing counsel.

Booz Allen Hamilton New York, NY
Associate, January 2022 – Present, On Leave of Absence During Summer 2022 and Summer 2023
Senior Consultant, July 2017 – December 2021
Consultant, June 2015 – June 2017
Drafted and updated hundreds of scripts for federal Affordable Care Act call centers that helped millions of Americans enroll in, and understand, health insurance. Led policy team in researching and analyzing statutes, regulations, and court orders that affected federal health insurance policy. Served as deputy lead for script writing team, which involved (1) reviewing team members' writing for clarity and accuracy and (2) organizing project timelines with team and the client.

U.S. Attorney's Office for the Eastern District of New York, Criminal Division Brooklyn, NY
Student Volunteer – Law Intern, Summer 2022
Drafted a response to a habeas petition, an appellate brief, and a memo for a motion to forfeit a bond. Reviewed evidence and conducted legal research for prospective indictments.

Fordham University School of Law New York, NY
Voting Rights & Democracy Forum, Deputy Executive Commentary Editor, Academic Year 2023 – 2024
Voting Rights & Democracy Forum, Founding Senior Articles Editor, Academic Year 2022 – 2023
Collaborate with authors to prepare their articles for publication by making substantive and grammatical recommendations.
Academic Success Program, Tutor, Spring 2022
Tutored first-year student in developing case reading, note taking, and exam taking skills for first-year torts class.
Legal Writing Program, Teaching Assistant to Adjunct Professor Chris Prevost, Academic Year 2021 – 2022
Held office hours to answer students' questions about legal writing, research techniques, and oral argument preparation. Taught students Bluebook citation rules and answered questions throughout the academic year.

WesCab Middletown, CT
Founder and Manager, August 2013 – January 2015
Developed affordable intracollegiate transportation option (Uber before Uber). Transported over 200 students.

INTERESTS

I enjoy backpacking (last winter, I went to Argentine Patagonia; this summer, I am hiking around Mount Rainier), having fun restaurant experiences (for the last couple of summers, my wife and I ride the Cyclone on Coney Island, then we get hot dogs and fried frog legs at the original Nathan's Famous), and going to the movies (I am an AMC theater subscriber).

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UNOFFICIAL TRANSCRIPT

Fordham University School of Law

Cumulative G.P.A.: 3.67

Fall 2020

Course Name	Instructor	Grade	Credit Units	Comments
Contracts	Helen Bender	A	5.0	
Torts	Jed Shugerman	A-	4.0	
Legal Process and Quantitative Methods	Various	P	1.0	P/F mini-course during 1L orientation
Legal Writing and Research	Chris Prevost	IP	0.0	Grade awarded in spring semester

Semester G.P.A.: 3.85

Spring 2021

Course Name	Instructor	Grade	Credit Units	Comments
Civil Procedure	Marc Arkin	A-	4.0	
Legislation and Regulation	Jennifer Gordon	B+	4.0	
Legal Writing and Research	Chris Prevost	A-	3.0	

Semester G.P.A.: 3.55

Fall 2021

Course Name	Instructor	Grade	Credit Units	Comments
Property	Nestor Davidson	A-	4.0	
Constitutional Law	Abner Greene	A-	4.0	
Sentencing Law and Policy	John Pfaff	A-	3.0	

Semester G.P.A.: 3.67

Spring 2022

Course Name	Instructor	Grade	Credit Units	Comments
Evidence	Daniel Capra	A-	4.0	

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State and Local Government	Nestor Davidson	A	3.0	
Criminal Law	Deborah Denno	A-	3.0	

Semester G.P.A.: 3.85

Summer 2022

Course Name	Instructor	Grade	Credit Units	Comments
Externship: Stein Scholars Fieldwork	N/A	P	3.0	Externship Fieldwork: U.S. Attorney's Office E.D.N.Y., Criminal Division
Externship: Stein Scholar Seminar	Judith Killen	B+	1.0	

Semester G.P.A.: 3.33

Fall 2022

Course Name	Instructor	Grade	Credit Units	Comments
Criminal Procedure: Investigative	Ethan Greenberg	A-	3.0	
Civil Litigation Drafting	Christopher Connolly	B+	3.0	
Workers, the Law, and the Changing Economy	Jennifer Gordon	A-	2.0	
Independent Study	Abner Greene	P	2.0	In satisfaction of writing requirement Paper topic: First Amendment protections of telephonic harassment of public officials

Semester Year G.P.A.: 3.54

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Spring 2023

Course Name	Instructor	Grade	Credit Units	Comments
Federal Courts	Abner Greene	A-	3.0	
Professional Responsibility	Russell Pearce	A-	3.0	
Fundamental Lawyering Skills	John Owens	A-	3.0	

Semester G.P.A.: 3.67

Fall 2023

Course Name	Instructor	Grade	Credit Units	Comments
Corporations	Caroline Gentile		4.0	
Critical Race Theory	Tanya Hernández		3.0	

Semester G.P.A.: T.B.D.

FORDHAM UNIVERSITY SCHOOL OF LAW
EXPLANATION OF TRANSCRIPT

Grade Scale for the Juris Doctor (J.D.)

Effective Fall 2014		Prior to Fall 2014	
Grade	**Quality Points**	**Grade**	**Quality Points**
A+	4.333	A+	4.30
A	4.000	A	4.00
A-	3.667	A-	3.70
B+	3.333	B+	3.30
B	3.000	B	3.00
B-	2.667	B-	2.70
C+	2.333	C+	2.30
C	2.000	C	2.00
C-	1.667	C-	1.70
D	1.000	D	1.00
F	0.000	F	0.00
P	Not in GPA	P	Not in GPA
S	Not in GPA	S	Not in GPA

Class Ranking - The Law School does not calculate class rankings.

Transfer Credit - Transfer credit (ex. TA, TB, etc.) represents work applicable to the current curriculum and must be a minimum of a "C" grade to be accepted. Transfer credit is not included in the weighted grade point average.

Repeating Courses - Only a course with a failed grade may be repeated. Failed required courses must be repeated. Failed elective courses may be repeated, however this is not required. If repeated, the quality points of the new grade will be half in value (ex. F/A would be 2.00 quality points). The original failing grade remains on the transcript.

Grade Scale for Master of Laws (LL.M.) and Master of Studies in Law (M.S.L.)

Effective Fall 2017	
Grade	**Quality Points**
H+	4.2
H	4.0
H-	3.8
VG+	3.6
VG	3.4
VG-	3.2
G+	3.0
G	2.8
G-	2.6
P+	2.4
P	2.2
P-	2.0
F	0.0

Prior to Fall 2017	
Grade	**Description**
H (Honors)	Outstanding performance
VG (Very Good)	Excellent performance
G (Good)	Above average performance
P (Pass)	Performance worthy of credit
F (Fail)	Inferior performance that does not satisfy the minimum standard for course credit

Effective Fall 2014 within each grade level (H, VG, G, P), students may be awarded a plus (+) or minus (-) to distinguish performance on the high end or the low end within the grade level.

Grade Scale for Legal Writing and Introduction to U.S. Legal System Courses

(These grades are not factored into honors determinations)

Students Admitted Prior to Fall 2017

Grade	Description
HP (High Pass)	Outstanding
PA (Pass)	Good or Acceptable
LP (Low Pass)	Passing, but deficient performance
FA (Fail)	Performance unworthy of credit

Students Admitted Prior to Fall 2011

Grade	Description
H (Honors)	Outstanding
CR (Credit)	Good or Acceptable
F (Fail)	Performance unworthy of credit

Grade Scale for Doctor of Juridical Science (S.J.D.)

Grade	Description
CR	Credit
NR	No Credit

Administrative Grades that May be Used in J.D., LL.M., and M.S.L Programs

AUD (Auditing)
CR (Credit)
INC (Incomplete)
IP (In Progress: year long course, final grade assigned in succeeding term)
NC (No Credit)
NGR (No Grade Received)
S (Satisfactory)
U (Unsatisfactory)
W (Withdrew)

Student education records on reserve are maintained in accordance with Public Law 93-380, sec 438, "The Family Education Rights & Privacy Act" (FERPA).The policy of Fordham University pertinent to this legislation is available from the Registrar upon request.

WESLEYAN UNIVERSITY • OFFICIAL STUDENT TRANSCRIPT

{214991_TRNW_TRANSCRIPT}

WESLEYAN UNIVERSITY
MIDDLETOWN, CONNECTICUT

ACADEMIC TRANSCRIPT OF:

Daniel Christian Caballero
1206 Lula Lake Road
Lookout Mountain GA 30750

Class: 2015
Major(s): Government
Student Type: Undergraduate

WesID: 214991 **Day of Birth:** May 15

Course	Title	Credit	Grade
	Pre-Matric 2012		
Advanced Placement			
ENGL	English Lit & Composition	1.00	CR
Advanced Placement			
HIST	U.S. History	1.00	CR
Advanced Placement			
HIST	World History	1.00	CR
	Fall 2012		
FILM307	The Language of Hollywood	1.00	B
HIST214	The Modern and the Postmodern	1.00	B-
HIST296	Colonial Latin America	1.00	B+
PHED118	Strength Training, Intro	0.25	CR
PHIL232	Beginning Philosophy	1.00	A-
	Spring 2013		
CHEM118	DNA	1.00	B
FILM304	History of World Cinema	1.00	B
HIST255	History of Spain	1.00	CR
PHIL202	Classics II:Early Modern Phil	1.00	B+
	Summer 2013		
COMP112	Introduction to Programming	1.00	A
FILM324	Visual Storytelling	1.00	A-
FILM458	Screenwriting	1.00	B-
GOVT387	Foreign Policy at the Movies	1.00	B+
	Fall 2013		
ASTR105	Descriptive Astronomy	1.00	C
GOVT270	Comp Pol of the Middle East	1.00	A-
GOVT390	Foreign Policy Decision Making	1.00	A
MDST251	Islamic Civilization	1.00	CR
PHIL278	Topics in Political Philosophy	1.00	B
	Spring 2014		
ECON101	Introduction to Economics	1.00	B
GOVT334	International Security	1.00	A-
GOVT366	Empirical Methods for Poli Sci	1.00	A-
PSYC105	Foundations Contemporary Psych	1.00	B

Course	Title	Credit	Grade
	Fall 2014		
FILM360	Philosophy and the Movies	1.00	B-
GOVT203	American Constitutional Law	1.00	B-
GOVT332	Psychology and IR	1.00	B+
HIST203	Modern Europe	1.00	B-
	Winter 2015		
GOVT311	United States Foreign Policy	1.00	A-
	Spring 2015		
AMST260	Bioethics: Animal/Human	1.00	C+
MATH132	Elementary Statistics	1.00	D
PHED104	Golf	0.25	CR
QAC156	Working with R	0.25	CR
QAC157	Working with SAS	0.25	A-
QAC380	Intro Statistical Consulting	1.00	A-

Minor in Film Studies
Bachelor of Arts Degree - May 24, 2015

Total Credits: 33.00 Grade Point Average: 86.05
Alternate GPA: 3.10

Date Printed: May 30, 2023

---- End of Academic Transcript ----

Joshua D. Berry
Registrar

FEDERAL LAW PROHIBITS THE RELEASE OF THIS RECORD TO ANY OTHER THIRD PARTY WITHOUT THE WRITTEN CONSENT OF THE STUDENT

August 01, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I write to give an extremely strong recommendation to Daniel Caballero for a clerkship in your chambers. Daniel is a sharp and creative thinker, a skilled researcher and excellent writer, and an all-around pleasure of a human being. I am confident he will be the best of clerks.

I met Daniel in his first year of law school, in Spring 2021. At the time, he was in my section of the required 1L course Legislation and Regulation, which combines a focus on the legislative process and statutory interpretation with an introduction to Administrative Law. He was then—and remains now—a student in Fordham's Evening Division, working full time as a healthcare consultant at Booz Allen Hamilton while attending law school at night. Despite a class size of over 60 students and the barriers imposed by the zoom format, I was immediately impressed by Daniel, and only grew more so over the course of the semester. From the high quality of his preparation and participation, I would have guessed that he had all the time in the world on his hands to focus on his classwork, not that he was balancing it with a serious day job. Daniel frequently brought healthcare-related litigations and regulations to my attention, noting how they exemplified or challenged points we had discussed in class. In addition to his deep engagement with the topic and materials of the course, he showed a mastery of the details of the Affordable Care Act and the complex regulations that govern its implementation that would have been impressive in an attorney several years out of school, never mind a student just beginning to study law.

I had the chance to work most closely with Daniel when he was one of nineteen students in my seminar, Workers, the Law, and the Changing Economy, in the Fall of 2022. This class has a heavy reading load and a demanding slate of three writing assignments. Although all three of his submissions were of high quality—Daniel is an excellent writer, incisive in his analysis and clear and concise in his prose—I was particularly struck by one of them. For a paper in which students were required to critically evaluate a strategy to advance workers' rights in the context of global supply chains, he considered whether there was any room to use consumer protection law against brands that advertise their "fair trade" or "conflict-free" products while in fact contracting for manufacturing with companies that rely on child labor and other practices that violate human rights norms. This was not among the ideas we had discussed in class; he came to it himself while thinking about the deception inherent in corporate claims of social responsibility absent meaningful monitoring. It is characteristic of Daniel's approach to problem-solving that when the obvious category of "labor law" did not provide a solution, he drew creative connections across fields to come up with an alternative. His paper ably backed up this idea through in-depth research and analysis. After he submitted his concept note for the paper, I was at a conference where litigators described the early stages of a cutting-edge case (the first, I believe, in the field) where they were preparing to use this strategy to address issues in the cocoa supply chain. It is both remarkable and yet typical of Daniel that he independently arrived at this litigation strategy at the same time as those working in the arena for decades.

Beyond his academic work, Daniel has demonstrated his leadership and honed his research, writing, and advocacy skills in a range of other contexts. Most students who work full time and attend our Evening Division are hard pressed to do more than attend classes. Daniel, however, has somehow managed to keep up a slate of extra-curricular activities that would be impressive even if he had nothing but school on his plate. He was elected by his peers to the position of Senior Articles Editor on the Fordham Voting Rights and Democracy Forum, a new publication, while also working as a staff member of the Fordham Urban Law Journal. He was selected through a competitive process as a Stein Scholar in Public Interest Law and Ethics, and—in recognition of his excellence as a writer and legal thinker—hired by faculty to work with his peers as a Legal Writing Teaching Assistant and, separately, a 1L tutor. And all this while keeping up a GPA that has put him on the Dean's List every semester since he started law school, and rising through the ranks at Booz Allen Hamilton, from Consultant to Senior Consultant to Associate (a promotion given while he was in his second year of law school). Daniel has also sought out work opportunities during his time in law school to hone his advocacy skills, including taking a leave from Booz Allen last summer to work at the US Attorney's Office for the Eastern District of NY, Criminal Division. He will take another leave this upcoming summer to serve as a summer associate at Selendy Gay Elsberg in the firm's litigation department.

Daniel is studying law with a specific purpose: to advance the interests of consumers in the field of healthcare. He has often expressed to me that his years of work as a healthcare consultant exposed him to the outsized power of medical providers and insurance companies in the field, frequently exercised to the detriment of consumers. He is pursuing a law degree to gain the tools he needs to address that imbalance of power. It was clear to me from the day I first met him, and is even clearer now, that Daniel has the intellect and the determination to achieve this at a very high level, whether through individual representation or at the level of government policy.

In addition to his agile mind, sharp research skills, and top-notch writing, Daniel's warmth and gentle sense of humor make him a joy to be around. I am tremendously confident that he will be an asset to your chambers, and it is my pleasure to recommend him to you.

Sincerely,

Jennifer Gordon

Jennifer Gordon - jgordon@fordham.edu - (212)636-7444

Professor of Law

Jennifer Gordon - jgordon@fordham.edu - (212)636-7444

August 01, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing with high praise for Daniel Caballero, who is applying for a clerkship in your chambers. I know Daniel from teaching him in Constitutional Law during his second year fall evening, from teaching him in Federal Courts this term, and more specifically from advising him on his paper on criminal telephonic harassment of public officials and their staff members.

Daniel has a wonderfully engaging temperament; he is a great pleasure to talk with about pretty much anything. His highly intelligent mind has been honed in part through his work for Booz Allen Hamilton on implementing the Affordable Care Act. He was enormously helpful in our class discussions in the fall of 2021 about the various cases that the ACA spawned. He has been equally as helpful this term in Federal Courts, with questions and comments that are observant, challenging, and offered with his infectious good nature and humor. If you meet him for an interview, you'll quickly like him enormously for his terrific interpersonal skills.

These skills go along with an excellent mind, which has produced a strong GPA so far at Fordham Law School. I have also seen that mind on display in advising Daniel on his First Amendment/criminal law paper. He spotted an interesting issue in his work last spring – when do phone calls to public officials that fall short of actionable threats nonetheless constitute actionable criminal harassment, and when are they protected by various aspects of the First Amendment (including the right to petition for redress of grievances)? The line is sometimes tricky to draw, and Daniel, with great writing skills and research that sweeps in some fascinating U.S. legal history, has been pursuing a measured approach that has produced a terrific piece of work so far. He may continue to hone it for publication.

Daniel would make a great addition to a chambers that needs someone with a sharp legal mind, excellent organizational/interpersonal skills, and great humor and optimism. You'll like him enormously and see how smart and fun he'd be to work with. I hope you hire him!

Sincerely,

Abner S. Greene

Abner Greene - agreene@fordham.edu

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

August 01, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I write to offer my highest and most enthusiastic recommendation for Daniel Caballero, Fordham Law School class of 2024, for a judicial clerkship. After law school, I had the honor to serve twice as a law clerk and I am absolutely confident that Daniel—who is a deeply thoughtful and remarkably hard-working student—will make a truly excellent part of any chambers. He is one of the more impressive students I have gotten to know over the past two decades and I urge you to give his application every consideration.

By way of background, I hold the Albert A. Walsh Chair at Fordham Law, where I specialize in property law, state and local government law, affordable housing law and policy, and related areas. I got to know Daniel first as an outstanding student in my introductory Property course, a rigorous and far-ranging survey, where he was a consistently insightful participant. Daniel mastered the fundamentals quickly and I enjoyed watching him making leaps in real time as our discussions unfolded all semester. When I needed a student to take our conversations to a more subtle place, I knew I could count on Daniel's wry, keen observations. I grade anonymously and I was gratified (when I got back the names of students connected to their exam numbers) to see how well Daniel had done on the final.

As strong as Daniel had been in Property, he seemed to hit another level altogether in my State and Local Government Law class, perhaps not surprisingly given his interest in public service. The course focuses on state constitutional structure and the legal determinants of local governance, ranging across an array of policy areas. As we engaged these topics, Daniel was at the heart of our discussions, not dominating over his classmates, but drawing them in. Daniel has the capacity to toggle between doctrine and real-world implications of legal challenges, something even the best upper-level students can struggle with. The well-deserved A he earned in the class reflected his deep engagement.

In addition to holding a demanding job, about which I will say more below, and excelling at his classes across the board, has also found time to hone his writing skills in impressive ways, so much so that he was asked to serve as a teaching assistant in our legal writing program. Daniel has shared with me, for example, a fascinating article he wrote during his time on the staff of the Urban Law Journal entitled Petition for Redress or Telephonic Harassment: When Calling the Government Is a Crime. The article addresses a legal question that is unfortunately becoming all too salient: does the First Amendment bar statutes that seek to protect public officials against harassment by telephone? Perhaps not surprisingly, given the long history of contentious political discourse in the United States, questions about whether the First Amendment covers vitriol and similar sentiments trace back to debates over the Sedition Act of 1798 and James Madison's defense of the need to allow even the expression of "hatred" against officials for a vigorous democracy to thrive. As contemporary cases have reached the courts, some have found that harassment of public officials is not speech protected by the First Amendment, others have broadly protected attacks that have some political component, and many courts have identified intermediate positions. Surveying the case law, Daniel proposes a nuanced framework that recognizes that telephone calls are inherently communicative but public officials deserve some measure of protection commensurate with the context in which that communication occurs. The article is deeply researched, carefully grapples with strong countervailing interests, and should provide guidance to advocates and courts as these controversies unfortunately continue.

As I mentioned, Daniel has shared with me his ambition to pursue a career in public service. A member of our prestigious Stein Scholars Program in Public Interest and Ethics, Daniel has also served as an intern at the U.S. Attorney's Office in the Eastern District. He has also thoughtfully built his coursework around a focus on criminal law, criminal procedure, and litigation more generally. Daniel is pursuing a clerkship to help prepare him for this pathway.

Before closing, I would be remiss if I did not highlight one of the most remarkable aspects of Daniel's law school experience. Daniel entered Fordham Law in the fall of 2020 as part of our evening program, one of the top-rated part-time programs in the country, and, unlike approximately fifty percent of entering evening students, Daniel has not transferred to our day division. That means that while he has excelled across the board in his classes, served on the staff of the Urban Law Journal and as a Senior Articles Editor on the Fordham Voting Rights and Democracy Forum, and other activities, he has not only maintain his work at Booz Allen Hamilton, but even got a promotion two years into law school. I cannot underscore enough how rare and truly impressive Daniel's ability to balance his responsibilities has been, a talent that will serve him well in what I have no doubt will be a brilliant legal career.

In short, I am delighted to offer my highest and most enthusiastic recommendation for Daniel as he pursues a judicial clerkship. He truly represents the best of Fordham Law's students—intelligence, wisdom, and calm, mature, dedication—and I have no doubt that he will be an excellent law clerk.

Please do not hesitate to contact me if I can be of any further assistance on this.

Nestor Davidson - ndavidson@fordham.edu

Sincerely,

Nestor M. Davidson
Albert A. Walsh Chair in Real Estate,
Land Use, and Property Law

Nestor Davidson - ndavidson@fordham.edu

Daniel Caballero

68 West 69th Street, Apt 1A • New York, NY 10023 • 423-503-8773 • dcaballero4@fordham.edu

WRITING SAMPLE

The attached unedited writing sample is response to a motion for summary judgment that I wrote for my Civil Litigation Drafting class with adjunct professor Christopher Connolly. It is being submitted with his permission. For this writing assignment, the professor provided exhibits from a fictional discovery process, which included emails, company performance evaluations, excerpts from depositions, and a memo of stipulated facts titled, "Background."

Plaintiff Kate Shelton respectfully submits this memorandum of law against Defendant Derby & Avon, L.L.C.'s (the "Firm's") motion for summary judgment.

PRELIMINARY STATEMENT

Plaintiff filed a complaint against Defendant alleging that the Firm discriminated against her in violation of Title VII of the Civil Rights Act of 1963, 42 U.S.C. § 2000e *et eq.*, as amended ("Title VII"). Plaintiff argues that the Firm discriminated against her on the basis of sex when they did not promote her and retaliated against her after she filed a complaint for discriminatory treatment with the Equal Employment Opportunity Commission ("E.E.O.C.").

The Firm now moves for summary judgment on both of Plaintiff's claims pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court should deny the motion in whole.

The record demonstrates genuine issues of material fact as to whether Plaintiff's sex was a consideration in the Firm's promotion decision. Although the Firm articulates legitimate, nondiscriminatory reasons for its decision to hire a barely experienced man over the far more experienced Plaintiff, the evidence shows that there are material factual disputes about those reasons. First, most of the Firm's reasons for its promotion decision do not relate to the original qualifications that it proffered when it solicited applications for the position. Second, the Firm's nondiscriminatory reasons for its promotion of Bristol over Plaintiff were either not unique to him, not necessary for the position, or not a significant consideration in the actual decision. Finally, there is a factual dispute regarding explicitly sexist justifications the Firm's managing partner made when he first announced the decision.

The record also demonstrates that there are genuine issues of material fact as to the Firm's retaliatory motives for its adverse employment actions against Plaintiff. Again, the Firm articulates legitimate, nondiscriminatory reasons for its decisions, but there is sufficient temporal and

circumstantial evidence for a jury to reasonably find that these asserted reasons are pretextual. First, the Firm's decision to staff Plaintiff with someone who sexually harassed her makes little sense given the company's unwritten staffing policies and the strongly deferential nature of the client's staffing request. Also, there is a sufficiently close temporal proximity between Plaintiff's filing of the E.E.O.C. complaint and the staffing decision to suggest that the former motivated the Firm to do the latter. Second, given the Firm's knowledge of the complaint and the sexual harassment Plaintiff endured, a jury could reasonably conclude that the decision to deny her an "exceeds expectations" evaluation and bonus was also retaliatory.

For the aforementioned reasons, the Court should deny the Firm's motion for summary judgment.

FACTUAL BACKGROUND

The Firm employs Plaintiff as a senior paralegal, and she has worked for the Firm continually since 2008. Bkgd. at 1. Plaintiff has consistently received the "exceeds expectations" grade, the highest mark available, on her performance evaluations since 2011. *Id.* She has also received a bonus each of those years. *Id.* Her excellent work performance was recognized in 2018 when the Firm promoted her to "Senior Paralegal." *Id.* This promotion represented the Firm's acknowledgment that Plaintiff "has distinguished herself among her peers and is someone who can take on a lot of responsibility." Danbury Dep. at 84. Both of Plaintiff's supervisors were senior paralegals before the Firm promoted them to paralegal supervisor. Danbury Dep. at 84. After receiving her promotion, Plaintiff continued to distinguish herself as a "go-getter." Doc. 1.

A. Weston's Promotion Decision

David Weston is the Firm's managing partner. On November 15, 2021, he announced via email that Bob Litchfield, one of the Firm's two paralegal supervisors, was retiring at the end of the year. Doc. 8. He also announced that the Firm would be looking to replace Litchfield by promoting an existing paralegal "with mature judgment, people skills, and initiative." *Id.* To determine if someone had these qualities, the Firm would consider each applicant's resume and annual evaluations. *Id.* Moreover, Weston said he would consult with Litchfield and Claire Danbury, the other paralegal supervisor, "given how well they know each of [the paralegals]." *Id.*

This approach was reasonable given Weston's position at the firm. Since his 2014 promotion to managing partner, he primarily focuses on management of the firm, including "crafting firm policies, establishing attorney compensation standards . . . and a host of other administrative tasks that preclude [him] from having an active litigation practice." Weston Dep. at 32. Given his limited litigation practice, Weston's interactions with paralegals have been minimal since he assumed his current role. Weston Dep. at 32. Accordingly, he relies primarily on paralegal

supervisors to oversee the performance of paralegals. *Id.* For example, Weston relies heavily on supervisor recommendations when making bonus determinations. Weston Dep. at 280. Although he is the "final-decisionmaker" for bonuses, Weston always follows the supervisors' recommendations. *Id.* The only requirement Weston has is that the supervisors only recommend people who are "also going to be receiving an 'exceeds expectations' [grade] on their annual performance evaluations." *Id.* But the "exceeds expectations" grade is given at the sole discretion of the paralegal supervisors, Bristol Dep. at 113, and only when their decision is unanimous. *See, e.g.*, Doc. 7 (showing paralegal supervisors as the sole evaluators for paralegal performance evaluations).

After receiving all the resumes for the paralegal supervisor position, Weston quickly reviewed them and each applicant's performance evaluations. Weston Dep. at 68. But Weston was confident that even this cursory review was unnecessary as he "pretty much knew their strengths and weaknesses" already. *Id.* He chose Tom Bristol for the paralegal supervisor position. *Id.*

Bristol is a 24-year-old man who had been working for the Firm as a paralegal for approximately eighteen months. Bkgd. at 2. He is also the nephew of the C.E.O. of Charter Oak Equity Investments, an investment fund that became one of the Firm's major clients in 2009. *Id.* Unlike Plaintiff, Bristol did not have any performance evaluations on file when he applied for the paralegal supervisor position. Bristol Dep. at 15. Regardless, he seemed to make an impression on Weston quickly. Doc. 1. After only three months of employment, Weston labeled him a "go-getter" after Bristol volunteered to attend a three-day training session on litigation software that Plaintiff also attended. Doc. 1. In early 2021, Weston was working on a toxic tort case – a rare opportunity given his administrative role at the firm – when Bristol was assigned as a paralegal. Weston Dep.

at 68. Bristol quickly impressed Weston with his technical and people skills, as well as his work ethic. *Id.*

B. Weston's Meeting with Litchfield and Danbury

On December 15, 2021, after Weston made his decision to promote Bristol, he called Litchfield and Danbury into his office as a "courtesy" so that they would know before he made the big announcement. Weston Dep. at 75. He also wanted to ensure they did not have any "huge objections" to his decision. *Id.* Accordingly, he only told them that he had made a tentative decision. *Id.* Before telling them that he had chosen Bristol, he wanted to know who Litchfield and Danbury would recommend. *Id.* Danbury believed that Plaintiff was the obvious choice given her "experience, people skills, and intelligence." Danbury Dep. at 83. Litchfield agreed. *Id.* Weston was not surprised at the selection since Litchfield and Danbury had worked with Plaintiff. Weston Dep. at 75. Additionally, Weston knew that Danbury and Plaintiff were good friends. *Id.*

When Weston told them that he had chosen Bristol, Litchfield was surprised. Litchfield Dep. at 78. Litchfield and Danbury recognized that Bristol was a "go-getter" and had made good first impressions, but they were concerned about his lack of experience. Litchfield Dep. at 78; Danbury Dep. at 83. Danbury expressed dissatisfaction with the choice as Plaintiff had far more experience than Bristol. Litchfield Dep. at 78; Danbury Dep. at 84. Additionally, Plaintiff had demonstrated her abilities over many years. Danbury Dep. at 84. Litchfield echoed these sentiments when he highlighted Plaintiff's senior paralegal promotion. *Id.*

Weston responded to Litchfield and Danbury's protests by saying that Bristol's promotion would "freshen things up." Danbury Dep. at 85; Weston Dep. at 75. In particular, Weston wanted a paralegal supervisor with Bristol's computer skills. Danbury Dep. at 85; Weston Dep. at 75; Litchfield Dep. at 78. This reason didn't make sense to Litchfield or Danbury, as those skills are not essential to the supervisor role. Litchfield Dep. at 102; Danbury Dep. at 85. A supervisor's

exposure to litigation software is limited to knowing which paralegals are familiar with it and ensuring there are enough paralegals trained on it. Danbury Dep. at 85. Danbury strongly believed maturity was far more critical to the supervisor role than computer skills. *Id.* Moreover, it was her opinion that there was "no reason to believe that [Plaintiff] can't learn whatever she needs to learn." *Id.* Upset that Weston was making a poor promotion decision, Danbury continued to make a case for Plaintiff's promotion. Danbury Dep. at 83. She said, "the decision was unfair and that seniority should count for something." *Id.* In response, Weston shot her a "cold look." *Id.*

He was growing increasingly impatient with the direction the discussion was going. Danbury Dep. at 83; Litchfield Dep. at 78; Weston Dep. at 75. Neither Litchfield nor Danbury had said anything that would change his mind. Weston Dep. at 75. He ended the meeting by reminding Danbury and Litchfield that Bristol was related to a major client. Danbury Dep. at 83; Weston Dep. at 75. According to Weston, Bristol's familial relationship made the promotion a good business decision. Weston Dep. at 75. But he also would have promoted Bristol even if he was not a client's nephew. Weston Dep. at 68.

Weston also told Litchfield and Danbury that having a man and a woman split the paralegal supervisor role made sense. Weston Dep. at 75. Weston claims that he prefaced this by saying Danbury herself had made that observation. *Id.* Danbury remembers the statement differently. *See* Danbury Dep. at 85. She remembers Weston saying that *he* thought it was a good idea. Danbury Dep. at 85. Danbury acknowledges that she said something similar in an internal memo she sent several months earlier about male paralegals sexually harassing female summer associates; but it was an offhand comment that she wrote in jest. Danbury Dep. at 86; *see* Doc. 2 (internal memo stating that male paralegals had been inappropriately flirting with female summer associates during

each of the past three summers). Litchfield's account more closely aligns with Weston's, although not completely. Litchfield Dep. at 78.

The next day, Weston announced Bristol's promotion to paralegal supervisor. Danbury Dep. at 83. This was not the first instance of the Firm making personnel decisions to Plaintiff's detriment.

C. Simsbury's 2018 Sexual Harassment of Plaintiff

When Plaintiff started working at the firm in 2008, she and Mike Simsbury, one of the Firm's partners, worked together without issue. Bkgd. at 5. Between 2015 and 2017, the two dated on an on-again, off-again basis. *Id.* In 2017, Plaintiff ended things with Simsbury after she started seeing Steve Shelton. *Id.* Plaintiff and Steve married in August 2017. *Id.* at 5-6. Shortly thereafter, Plaintiff found it was becoming harder to work with Simsbury. *Id.* at 6. He would get angry with her more easily over minor issues, dismissed her artistic pursuits as "silly photographer fantasies," and got uncomfortably close to her, often leaning over her when she was seated at her desk. *Id.* Plaintiff brought her concerns to Litchfield, but he dismissed her complaints and continued assigning her to work with Simsbury. Litchfield Dep. at 45; *id.*

On April 20, 2018, Simsbury's increasing abusiveness towards Plaintiff came to a head. After asking her to work late, Simsbury sent Plaintiff to the supply room to retrieve some items. Bkgd. at 6. The supply room was rarely occupied and usually deserted. Litchfield Dep. at 45. As she tried to leave, Simsbury entered the room and approached Plaintiff. *Id.* She could smell alcohol on his breath. *Id.* She tried to leave, but Simsbury blocked the doorway. *Id.* He knew she had recently separated from her husband and told her, "She could use a real man. It's now or never." *Id.* Simsbury grabbed her around the waist and tried to forcefully kiss her, saying, "You can make this hard or easy." *Id.* Plaintiff was able to push the drunkard out of the way, run out of the building, and head straight home. *Id.*

The next day at the office, Plaintiff came into Litchfield's office in tears. Litchfield Dep. at 45. She recounted her story to him and said she would quit before ever working with Simsbury again. *Id.* Thereafter, Litchfield never assigned the two together. *Id.* Sometime after the incident, Litchfield told Weston that he made it a point not to assign the two together because of their personal relationship. Weston Dep. at 256. Weston did not object, nor did he inquire further. *Id.* He relies heavily on paralegal supervisors to make such management decisions. *Id.* Additionally, the Firm does not maintain written policy guidelines for handling disputes between attorneys and paralegals. *Id.* at 240. Instead, it uses a flexible approach with supervisors as the initial problem solvers. *Id.* Only when supervisors fail to resolve the issue does it get escalated to Weston. *Id.*

D. The E.E.O.C. Complaint and Mediation Offer

On February 14, 2022, nearly two months after the promotion announcement, Plaintiff filed a complaint of discrimination against the Firm with the E.E.O.C. Doc. 5. She noted the firm's "history of treating women poorly" and her sexual assault in 2018. *Id.*; *see also* Doc. 2 (internal memo stating that male paralegals had been inappropriately flirting with female summer associates during each of the past three summers). The Firm was served the complaint within 48 hours. Weston Dep. at 138. On February 28, 2022, Weston sent a response on behalf of the Firm, disavowing any discriminatory intent in the promotion decision. Doc. 6.

The E.E.O.C. conducted a preliminary investigation, which involved taking statements from Plaintiff, Weston, Danbury, Bristol, and Litchfield. Bkgd. at 5. After the completion of the investigation, the E.E.O.C. offered to mediate the dispute. *Id.*

E. The New Haven Group Matter and the Firm's Rejection of the Mediation Offer

On July 10, 2022, the New Haven Group ("NHG") retained the Firm as counsel in a new matter. Torrington Dep. at 32. NHG's general counsel, John Torrington, had previously worked for the Firm and was familiar with its personnel. *Id.* When he first talked to Weston about retaining

the Firm, he immediately knew that he wanted Simsbury to lead the litigation team. *Id.* But beyond Simsbury, Torrington told Weston, and later Simsbury, that he trusted Simsbury with the rest of the staffing decisions: "Mike you're the captain of your ship." *Id.* Torrington mentioned Plaintiff as an option for a head paralegal role, but that opinion was based on similar work he had done with her ten years earlier. *Id.* In a follow-up email the next day to Simsbury and Weston, Torrington summarized the previous day's phone conversation. Doc. 4. Accordingly, he restated everything he had said already: excitement at the opportunity to work with the Firm's personnel again, mentioning Plaintiff as a possible paralegal staffing option, and repeating his deferential position. *Id.*

After the call with Torrington, Simsbury called Bristol to discuss paralegal staffing of the case. Simsbury Dep. at 72. When Simsbury told Bristol about Torrington's request for Plaintiff, Bristol noticed that Simsbury was bothered by it. Bristol Dep. at 92. Bristol had heard rumors that Simsbury and Plaintiff had "dated a long time ago and had had a pretty bad breakup and that it had something to do with Kate's marriage or separation." *Id.* Simsbury informed Bristol that Plaintiff would likely resist the assignment because she considered him an "abusive monster." Simsbury Dep. at 72. He wanted Bristol to "know that this wasn't as straightforward as he might think." *Id.* But Simsbury said that as far as he was concerned, "it was ancient history." *Id.* He had "put it in the past and so should she." *Id.* at 73.

Two days later, the Firm rejected the E.E.O.C. mediation offer. Bkgd. at 8.

F. Bristol Assigns Plaintiff to Work with Simsbury

The day after the Firm rejected the E.E.O.C.'s offer, Bristol told Plaintiff that she was to be assigned to the NHG matter with Simsbury. Bkgd. at 5. Plaintiff told Bristol that she hadn't "been assigned to work with Simsbury since 2018 after he had sexually assaulted [her]." Shelton Dep. at 324. Bristol told her that it sounded like "ancient history" and that she needed to "stop

being such a complainer and learn to be more of a team player." Shelton Dep. at 324. She told Bristol that she believed the staffing decision was in response to her E.E.O.C. complaint, and that she would not be intimidated. Shelton Dep. at 324. Bristol responded by threatening her with a negative performance evaluation and a withholding of her bonus: "[her] insubordination would have to be considered in [her] annual review and any disciplinary action the firm might take; at a minimum, I [Bristol] will make sure that you [Shelton] do not get any type of bonus this year." Bkgd. at 7. Plaintiff walked away. Shelton Dep. at 324.

The Firm does not maintain a formal policy regarding a client's request that particular staff be assigned to a specific matter. Weston Dep. at 225. The rule of thumb is that requests should be accommodated because "the customer is always right." *Id.* However, the Firm makes an exception when a requested employee is already committed to other work or when the Firm thinks that the "staffing proposed by the client will undermine the effectiveness of [the Firm's] advocacy." *Id.*

G. The Consequences for Plaintiff's Refusal to Work with Simsbury

After Plaintiff's refusal to work with Simsbury, she received a "meets expectations" grade on her August 12, 2022, performance review. Doc. 7. The review noted that Plaintiff's performance was exemplary with one exception – her refusal to work with Simsbury: "But for her unwillingness to take on a recent assignment, she would receive our highest evaluation of 'exceeds expectations.'" Doc. 7; *see also* Bristol Dep. at 109.

To receive an "exceeds expectations" grade and a bonus, both paralegal supervisors must agree on the award. Bristol Dep. at 113. Danbury thought that Plaintiff deserved the grade and the bonus, Bristol did not. *Id.* He believed that Plaintiff's refusal to work with Simsbury meant that "she was not willing to put [the Firm's] interests first." *Id.*

ARGUMENT

I. SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment can only be granted when "the movant shows that there is no genuine dispute as to any material fact." Fed.R.Civ.P. 56(a). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue about a material fact exists when there is sufficient evidence to allow a reasonable jury to return a verdict for the nonmoving party. *Id.* Moreover, when considering the motion, the court must construe all evidence and rational inferences "in the non-movant's favor." *Kirkland v. Cablevision Systems*, 760 F.3d 223, 224 (2d Cir. 2014).

At the summary judgment stage, the *McDonnell Douglas* tripartite framework governs evidentiary burdens for Title VII claims of discrimination and retaliation. *See Kirkland*, 336 F.3d at 225. First, a plaintiff must demonstrate a *prima facie* case of discrimination or retaliation. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Second, if the plaintiff satisfies their burden, then the defendant employer must articulate "some legitimate, nondiscriminatory reason" for the employment action. *Id.* Finally, if the defendant satisfies their burden, "the governing standard is whether the evidence, taken as a whole, is sufficient to support a reasonable inference that prohibited discrimination occurred." *James v. New York Racing Ass'n*, 233 F.3d 149, 156 (2d Cir. 2000). Put differently, "the test for summary judgment is whether the evidence can reasonably support a verdict in plaintiff's favor." *Id.* at 157.

II. A REASONABLE JURY COULD FIND THE FIRM'S ASSERTED NONDISCRIMINATORY REASONS FOR PROMOTING BRISTOL OVER PLAINTIFF TO BE PRE-TEXTUAL

Plaintiff has sufficient evidence to support a *prima facie* claim of discrimination. Title VII proscribes employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . .

sex . . . ." 42 U.S.C. § 2000e-2(a)(1). To state a *prima facie* claim of discrimination under Title VII, "a plaintiff must plausibly allege that (1) the employer took adverse action against him and (2) his race, color, religion, sex, or national origin was a motivating factor in the employment decision." *Vega v. Hempstead Union Free School Dist.*, 801 F.3d 72, 86 (2d Cir. 2015). Plaintiff satisfies the first prong because failure to promote an employee constitutes an adverse action. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). Plaintiff satisfies the second prong of the *prima facie* standard because (1) as a woman, she is a member of a protected class, (2) she was qualified for the position she applied for, *see* Litchfield Dep. at 78; Danbury Dep. at 83, (3) she was denied the position, *see* Bkgd. at 3, and (4) there was an inference of sex-based discrimination because a man was promoted instead of Plaintiff, *see Jain v. Tokio Marine Management Inc.*, 16cv8104, 2018 WL 4636842, at *5 (S.D.N.Y. Sept. 27, 2018) (finding that courts have generally found an inference of discrimination where someone not a member of the same protected class as the plaintiff was hired). *See Brown v. Coach Stores, Inc.*, 163 F.3d 706, 709-10 (2d Cir. 1998) (establishing four-part framework for *prima facie* claims of discrimination based on a failure to promote).

A. Although the Firm articulates nondiscriminatory reasons for not promoting Plaintiff, a jury could reasonably conclude that they are pretextual

The evidence in this case is "sufficient to support a reasonable inference that prohibited discrimination occurred." *Jones*, 233 F.3d at 156. The Firm provides three nondiscriminatory reasons for promoting Bristol instead of Plaintiff: professional reputation and capabilities, Weston's impressions of Bristol's technical capabilities, and connection to a major client. Def. Mot. at 1-2; 11. There is sufficient evidence to suggest that these reasons are pretextual.

Most of the Firm's reasons do not relate to the listed qualifications for the Paralegal Supervisor Position. In Weston's announcement email, he wrote, "we are looking for an individual

with mature judgment, people skills, and initiative." Doc. 8. Weston also wrote that the promotion would be based on annual evaluations and the Paralegal Supervisors' recommendations. *Id.* Plaintiff had 10 years of "exceeds expectations" evaluations. Bkgd. at. 1. Bristol had never received a performance evaluation until after his promotion. Bristol Dep. at 15. Both paralegal supervisors believed that Plaintiff was a shoo-in for the position and strongly recommended her. *See* Danbury Dep. at 83; Litchfield Dep. at 78. Although Weston wrote that Paralegal Supervisor recommendations would be considered, Doc. 8, he completely and admittedly disregarded them, Weston Dep. at 75. Because Weston threw out the original criteria in making his executive decision to promote Bristol instead of Danbury, a jury could reasonably find his decision making suspect. *See, e.g.*, *Zann Kwan v. Andalex Group L.L.C.*, 737 F.3d 834, 846 (2d Cir. 2013) (finding that shifting explanations for an adverse employment action was a factor in creating a triable issue of fact). Weston may have believed that Bristol was qualified, Weston Dep. at 68, but Plaintiff met all of the listed qualifications and had far more experience than Bristol. Weston Dep. at 75. Although not dispositive in determining whether a reasonable basis exists for finding discriminatory intent, courts have found that superior qualifications have probative value. *See Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001); *Jain*, 2018 WL 4636842, at *6.

Putting aside Weston's convenient changes to the criteria for the Paralegal Supervisor position, the Firm's nondiscriminatory reasons for promoting Bristol were not unique to him, relevant for the position, or relevant to the decision.

Although Bristol had a positive reputation at the Firm, Bkgd. at 3, this was not a unique characteristic. Plaintiff also had a positive reputation. Doc. 1. Weston ascribed the same "go-getter" moniker to both Bristol and Plaintiff. *Id.* Plaintiff had a long record of exceeding

expectations on her performance reviews. Bkgd. at 1. She was promoted to Senior Paralegal in 2018, a sign that she was a reliable employee and could be in line for a supervisor promotion. Danbury Dep. at 84. Moreover, her direct supervisors thought highly of her. They described her as smart, Litchfield Dep. at 78, hardworking, Danbury Dep. at 84, and easy to work with, *id.*

Bristol's technology capabilities were not necessary for the Paralegal Supervisor position nor were they unique to Bristol. Although Bristol had a minor in computer technology, he did not have any experience with litigation software until a training session in the fall of 2020. Bristol Dep. at 29. Plaintiff attended the exact same training session. Doc. 1. Technology expertise is also irrelevant for the Paralegal Supervisor position. Litchfield Dep. at 102; Danbury Dep. at 85. Paralegal Supervisors' role is focused on overseeing the staffing and performance of paralegals. Bkgd. at 2. Insofar as technology knowhow could be useful in assigning paralegals, Danbury was confident that Plaintiff could easily get up to speed for the supervisor position. Danbury Dep. at 85. When Danbury and Litchfield pointed out that Weston had misjudged Plaintiff's technology capabilities, Weston grew frustrated and was forced to identify other justifications for his promotion decisions. Litchfield Dep. at 78; Danbury Dep. at 83. "Courts have recognized that an employer's disregard or misjudgment of a plaintiff's job qualifications may undermine the credibility of an employer's stated justification for an employment decision." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001).

The Firm's nepotistic justification for denying Plaintiff's promotion would not prevent a jury from reasonably finding illegitimate, discriminatory intent. Weston stated that this factor was not determinative of his decision. Weston Dep. at 68. Therefore, a jury could give it little probative value, especially given the context in which the reason was stated. During Weston's meeting with Litchfield and Danbury, they pointed out the flaws in Weston's previous justifications. Litchfield

Dep. at 78; Danbury Dep. at 83-86. Weston was left searching for some justification unique to Bristol. The first one Weston identified was Bristol's relationship to a major client. *Id.* As previously stated, shifting justifications for an adverse employment action make those justifications suspect. *See Zann*, 737 F.3d at 846.

During his meeting with the paralegal supervisors, Weston explicitly stated that a basis for his decision was Bristol's sex. Weston Dep. at 75. The Firm attempts to make little of this fact by asserting that Weston was merely parroting Danbury's own past statements. Def. Mot. at 12. But Danbury claims that her original statement was an offhand comment and not meant to be taken seriously. Danbury Dep. at 86. Differing interpretations of a seemingly discriminatory statement are exactly the kind of questions of material fact that are to be left to juries. *See Abrams v. Department of Public Safety*, 764 F.3d 244, 253 (2d Cir. 2014). Moreover, on summary judgment, factual ambiguities are to be reasonably interpreted in the nonmovant's favor. *See Kirkland*, 760 F.3d at 224. A reasonable interpretation of this statement in Plaintiff's favor would allow a jury to conclude that the Firm's promotion decision was based on discriminatory intent.

The Firm has not carried its burden of showing a lack of genuine disputes as to any material fact. A reasonable jury could find the Firm's legitimate, nondiscriminatory reasons for promoting Bristol over Plaintiff were pretextual. Accordingly, the Court should deny the motion for summary judgment regarding the Title VII discrimination claim.

III. THE RECORD REASONABLY SUGGESTS THAT THE FIRM MAY HAVE DENIED PLAINTIFF A BONUS FOR RETALIATORY REASONS

Plaintiff has satisfied her initial *prima facie* burden for her retaliation claim. Title VII proscribes employers from discriminating against employees who file a complaint with the E.E.O.C. 42 U.S.C. § 2000e-3(a). The proscription against retaliation applies regardless of whether the underlying claim proves successful or not. *See Lore v. City of Syracuse*, 670 F.3d 127, 157 (2d

Cir. 2012). Plaintiff has made a *prima facie* case of retaliation because (1) she participated in a protected activity by filing a complaint with the E.E.O.C., Doc. 5, (2) the Firm had knowledge of the complaint, Doc. 6; Weston Dep. at 138, (3) the Firm assigning Plaintiff to work with Simsbury and then denying Plaintiff a bonus because of her refusal to do so constitute adverse employment actions, Doc. 7, and (4) the temporal proximity between Plaintiff's filing of the E.E.O.C. complaint and the adverse employment actions establishes a sufficient causal connection, *see Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 110 (2d Cir. 2010). *See Zann Kwan*, 737 F.3d at 844 (establishing four-part framework for *prima facie* claims of retaliation).

A. A jury could reasonably find retaliatory intent in assigning Plaintiff to work with Simsbury

There is sufficient evidence for a jury to find that the Firm's articulated legitimate nondiscriminatory reason for assigning Plaintiff to work with Simsbury is pretextual. The Firm asserts that they were simply engaging in good business practices by accommodating a client's staffing request. Def. Mot. at 14-15. However, as the Firm concedes, there is no written policy regarding such requests. *Id.* at 15. Moreover, the unwritten policy carries an exception for staffing requests that would undermine the Firm's advocacy effectiveness. Weston Dep. at 225.

Bristol's decision to staff Plaintiff on a matter with Simsbury was unreasonable given his knowledge of company policy and Plaintiff's prior relationship with Simsbury. Bristol knew that Plaintiff and Simsbury had not worked together for some time. Bristol Dep. at 92. He also knew that Plaintiff considered Simsbury a sexual abuser, Shelton Dep. at 324, and an "abusive monster," Simsbury Dep. at 72. This is the type of staffing request that would put the team's advocacy performance at risk, and therefore, it would fall within the Firm's client request policy exception.

The business logic of the staffing decision is even more questionable given the nature of Torrington's request. In Torrington's initial communications with Weston, he strongly requested

that Simsbury lead the litigation team. Torrington Dep. at 32. By comparison, Torrington's follow-up suggestion of staffing Plaintiff was very deferential to the Firm's decision making. *Id.*; Doc. 4. Given the gravity of Plaintiff's accusations against Simsbury, the deference of Torrington's staffing request, and the company policy regarding such requests, Bristol's insistence on Plaintiff's assignment to the matter seems suspect.

Based on the timing of Plaintiff's E.E.O.C. complaint, a jury could reasonably infer that Bristol's staffing decision was retaliatory. Only five months had passed between Plaintiff's filing of her E.E.O.C. complaint and Bristol's questionable staffing demand. *See* Doc. 5; Doc. 6; Bkgd. at 5. The two events are sufficiently close in temporal proximity to suggest the former caused the latter. *See Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 555 (2d Cir. 2001) (holding that five months is close enough in time to find a causal relationship). It is also noteworthy that only one day had passed between the retaliatory conduct and the Firm's rejection of the E.E.O.C.'s invitation to mediate the dispute between Plaintiff and the Firm. Bkgd. at 8. As the Firm notes in its brief, Def. Mot. at 16, temporal proximity alone is not enough to defeat summary judgment. *See El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 933 (2d Cir. 2010) (per curiam). But summary judgment can be overcome where a plaintiff points to additional considerations such as "weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action." *Zann Kwan*, 737 F.3d 834, 846. Because the assignment also violated the Firm's own unwritten staffing policy and was nonsensically deferential to a client request made in passing, Plaintiff has sufficiently demonstrated the weakness of the Firm's articulated nondiscriminatory reason for staffing her on the Simsbury matter.

B. A jury could reasonably find that the Firm's denial of an "exceeds expectations" evaluation and bonus were motivated by a retaliatory intent

There is sufficient evidence to reasonably suggest that Bristol's denial of a "exceeds expectations" performance evaluation was retaliatory. According to the Firm, Plaintiff's refusal to work on the New Haven Group matter with Simsbury was a legitimate basis for Bristol to deny her a grade of "exceeds expectations." Def. Mot. at 16. In other words, the Firm argues that Plaintiff failed to be a "team player" because she refused to work with a man who sexually harassed her — a fact that the Firm does not dispute, Def. Mot. at 7.

By denying Plaintiff the "exceeds expectations" performance grade, Bristol effectively denied her a bonus. He knew that the paralegal supervisor recommendation for a bonus could only be given if both Supervisors agreed that a paralegal received an "exceed expectations" performance evaluation. Weston Dep. at 280; Bristol Dep. at 113. Therefore, his threat to consider Plaintiff's refusal as part of her performance evaluation was more consequential than just the grade. *See* Shelton Dep. at 324. The unreasonableness of his demand is particularly striking given that his fellow supervisor, Danbury, thought that Plaintiff deserved both the high performance grade and the accompanying bonus despite her refusal to work with Simsbury. Bristol Dep. at 113. Furthermore, Bristol admits that the sole basis for his refusal was Plaintiff's refusal to work for someone who had sexually assaulted her. Bristol Dep. at 109.

The timing of Bristol's actions combined with their unreasonableness provides enough evidence for a jury to find the "meets expectations" grade was motivated by retaliatory intent. As stated earlier, Plaintiff's claim survives summary judgment if she can show both temporal proximity and weaknesses in the Firm's articulated nonretaliatory reason for its adverse employment action. *Zann Kwan,* 737 F.3d 834, 846. Based on his conversations with Simsbury, Bristol knew that Plaintiff considered Simsbury an "abusive monster." Simsbury Dep. at 72. Based

on his conversations with Plaintiff, he knew that Plaintiff accused Simsbury of sexually assaulting her. Shelton Dep. at 324. Finally, Bristol knew that Plaintiff had filed a lawsuit against the Firm, and believed the assignment was retaliatory. *Id.*; *see also* Bkgd. at 5 (stating that the E.E.O.C. completed a preliminary investigation that involved taking statements from Bristol). Yet, despite all these facts, Bristol threatened Plaintiff's performance evaluation, and by implication, her bonus. *Id.* Based on this information, a jury could reasonably conclude that Bristol did not give her a "meets expectations" grade because she did anything wrong, but because she was suing the Firm.

Because a jury could reasonably find that the Simsbury work assignment, reduced performance grade, and the bonus denial were retaliatory, the Court should not grant summary judgment on Plaintiff's retaliation claims.

CONCLUSION

For the foregoing reasons, the Court should deny the Firm's motion for summary judgment.

Dated: New York, New York

December 09, 2022

Respectfully submitted,

/s/ Daniel C. Caballero

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WRITING SAMPLE

I wrote the attached writing sample, a response to a petition for a writ of habeas corpus, during my summer internship at the U.S. Attorney's Office for the Eastern District of New York. For the most part, it has only been lightly edited. My Assistant U.S. Attorney mentor, Ivory Bishop, wrote the highlighted portions in the Background section in their entirety. However, all the legal research and arguments are my own. It is being submitting with his permission.

On April 13, 2023, the court denied the plaintiff's motion. *See Price v. United States*, No. 22-CV-996 (NGG) (E.D.N.Y. Apr. 13, 2023).

PRELIMINARY STATEMENT

At 38 years old, Sean Price (the "defendant") persuaded, induced, and enticed Jane Doe, a sixteen-year-old girl from Australia, to travel from Sydney, Australia, to Jamaica, New York, to engage in sexual activity. He also solicited and received multiple sexually explicit images of Jane Doe. Following a jury trial in December 2017, he was convicted of (1) interstate and foreign enticement to engage in illegal sexual activity, (2) interstate and foreign transportation of a minor to engage in illegal sexual activity, (3) transportation of an individual with intent to commit rape, and (4) attempted sexual exploitation of a child. On May 18, 2018, Your Honor sentenced the defendant to a term of 420 months' imprisonment to be followed by ten years of supervised release. (Judgment, ECF No. 124).

The defendant, acting pro se, now seeks to vacate his conviction under 18 U.S.C. § 2255 on the basis that he was denied effective assistance of counsel, alleging that: (1) his attorney failed to adequately inform him of the potential benefits and consequences of pleading guilty, including that the government could obtain a superseding indictment charging the defendant with additional misconduct if he did not plead guilty; and (2) his attorney failed to adequately negotiate a plea agreement on his behalf. (Pro Se Memorandum of Law in Support of Motion to Vacate, Set Aside or Correct a Federal Sentence or Conviction Pursuant to 28 U.S.C. § 2255, ECF No. 154 ("Def. Mem."), at 2).

Contrary to the defendant's assertions, defense counsel repeatedly advised the defendant to plead guilty. The government's pursuit of a superseding indictment—an act not within defense counsel's power to predict—did not render counsel's legal assistance ineffective. Finally, the defendant offers no evidence that counsel failed to adequately negotiate a plea offer on the defendant's behalf. For these reasons, as further described below, the Court should deny

the defendant's motion in its entirety.

BACKGROUND

I. The Offense Conduct

In October 2016, the defendant, then a grown man of 38, communicated with an Australian sixteen-year-old girl ("Jane Doe") over social media. (See Presentence Investigative Report ("PSR") ¶ 9). Knowing his victim's age and struggles with depression and suicidal ideation, the defendant pursued a sexual relationship with Jane Doe. (PSR ¶ 9; Third Addendum to the Presentence Report). In furtherance of this objective, the defendant solicited and received at least 100 sexually explicit images of her. (PSR ¶¶ 9, 14, 17). Additionally, he told Jane Doe that he loved her and repeatedly encouraged her to travel to the United States. (PSR ¶ 9). He promised her marriage, a family, and the hopes of United States citizenship. (PSR ¶ 9).

As the defendant's plan progressed, he made plain in his communications with Jane Doe his understanding that a sexual relationship would be unlawful. Between January 2017 and April 2017, the defendant openly discussed with Jane Doe the potential legal ramifications were he to have sexual intercourse with her. (PSR ¶ 9). For example, when discussing impregnating Jane Doe so that she could have the baby before she turned 18 years old, the defendant said, "…we will but I'm not signing the birth certificate until after you turn 18." (Tr., at 506:18-19). When Jane Doe rejected that proposition, the defendant responded by saying, "I just don't want to go to jail." (Tr., at 506:24-25). The two then agreed that signing the birth certificate before she turned 18 would not matter if Jane Doe assumed a new name and identity once in the United States. (Tr., at 507:1-508:1). The defendant encouraged Jane Doe to identify people who might help her to obtain a fake passport; gave her suggestions on how to destroy

any evidence of their communications; and wired over $1,148 to her so that she could buy a plane ticket to the United States to meet him. (PSR ¶ 9).

On March 28, 2017, after the defendant sent $918 to her to buy a ticket, Jane Doe boarded a flight from Sydney, Australia to Los Angeles, California, where the defendant planned to collect her. (PSR ¶ 9). On April 11, 2017, the defendant met Jane Doe at Los Angeles International Airport. (PSR ¶¶ 10, 12). In a car rented by the defendant, the two drove from Los Angeles to Queens, New York. (PSR ¶ 13). The trip took several days during which the defendant repeatedly had sexual intercourse with Jane Doe. (PSR ¶ 10, 13). After arriving in New York, the defendant continued to engage in sexual intercourse with her while they stayed at his home in Queens. (PSR ¶ 10).

II. Arrest and Indictment

Jane Doe's parents reported her missing. (PSR ¶ 8). After an investigation involving Australian law enforcement, the United States Department of Homeland Security, and the New York City Police Department ("NYPD"), law enforcement traced Jane Doe to the defendant's home in Queens and went there to locate her. (PSR ¶ 11). The defendant's mother answered the front door, at which time NYPD officers observed the defendant and Jane Doe attempting to flee through the backdoor. (PSR ¶ 11). The defendant was arrested on New York state charges, including Rape in the Third Degree, among other charges. (PSR ¶ 11). After being processed at an NYPD station and advised of his Miranda rights, the defendant admitted to the core facts of his exploitation of Jane Doe, including but not limited to admitting to engaging in sexual intercourse with her, knowing that she was just sixteen years of age. (PSR ¶¶ 12-13). The defendant also consented to a search of his cellular telephone, where agents located sexually explicit photographs of Jane Doe. (PSR ¶ 14).

On June 6, 2017, a grand jury sitting in the Eastern District of New York returned an indictment charging the defendant with (1) interstate and foreign enticement to engage in illegal sexual activity; (2) interstate and foreign transportation of a minor to engage in illegal sexual activity; and (3) transportation of an individual with intent to commit rape (the "Indictment"). On June 16, 2017, the defendant was arraigned on the Indictment and entered a plea of not guilty.

III. Plea Offers and the Superseding Indictment

On or about August 4, 2017, the government offered a plea agreement to the defendant. (Declaration of James M. Branden dated January 17, 2022 ("Branden Aff."), attached hereto as Exhibit A, at ¶ 5). The plea agreement offered the defendant the opportunity to plead guilty to the Indictment in exchange for the benefits he would receive for acceptance of responsibility before the government had to prepare for trial. On August 7, 2017, the defendant met with his attorney to review and discuss the proposed agreement. (Branden Aff., Ex. A at ¶ 5). His attorney reviewed the overwhelming evidence against him, explained the charges he faced, and advised him to accept the guilty plea. (Branden Aff., Ex. A at ¶ 20). Counsel noted that (1) a plea would result in a reduced sentence under the Federal Sentencing Guidelines; (2) Jane Doe would be forced to testify at trial, which may cause trauma to her and be prejudicial to the defendant; and (3) other evidence damaging to the defendant might be admitted at trial that might not be raised in a sentencing following a guilty plea. (Branden Aff., Ex. A at ¶ 20).[1] After receiving the advice of his attorney, the defendant rejected the offer and made clear that he would never plead guilty. (Branden Aff., Ex. A at ¶ 20).

[1] Counsel does not recall advising the defendant about the possibility of a superseding indictment if he rejected the plea offer. (Branden Aff., Ex. A at ¶ 24).

Despite the defendant's summary rejection of any possible guilty plea, his attorney, Mr. Branden, still attempted multiple additional times to negotiate a more favorable plea agreement with the government on the defendant's behalf. (Branden Aff., Ex. A at ¶¶ 19, 22). Additionally, Mr. Branden met with the defendant's mother on multiple occasions and told her that he believed her son was unlikely to be acquitted at trial and that her son should accept a guilty plea offer. (Branden Aff., Ex. A at ¶ 21).

On September 3, 2017, a superseding indictment (the "S-1 Indictment") was filed charging the defendant with the initial offenses (Counts One through Three) as well as one count of attempted sexual exploitation of a minor, three counts of receipt of child pornography and one count of possession of child pornography (Counts Four through Eight). (Branden Aff., Ex. A at ¶ 9). In October 2017, after the defendant's motion to suppress was denied, the government extended a new plea offer. (Branden Aff., Ex. A at ¶¶ 10, 12). This offer required the defendant to plead guilty to Count Two, which, with credit for acceptance of responsibility, would have carried a sentencing range of 262-327 months of imprisonment. (Branden Aff., Ex. A at ¶ 12). The defendant rejected the plea, reiterating that he would "never" plead guilty. (Branden Aff., Ex. A at ¶ 20).

In a letter dated October 30, 2017, Mr. Branden informed the Court that the defendant had contacted him and asked him to request a status conference, during which the defendant would request new counsel. See ECF No. 50. According to Mr. Branden, the defendant alleged that Branden had "been ineffective" and had "a conflict of interest." ECF No. 50. On November 2, 2017, the Court granted the defendant's request and Mr. Branden was relieved. See Docket No. 52. On November 7, 2017, Zoe J. Dolan was appointed to represent the defendant. See Docket No. 52. Ms. Dolan also advised the defendant to accept the second

plea offer, but as he had done with Mr. Branden, the defendant rejected the idea of pleading guilty and insisted upon a trial. (Branden Aff., Ex. A at ¶¶ 15, 23).[2] Accordingly, the case proceeded to trial.

On the third day of trial, Ms. Dolan passed a note to the government indicating that the defendant indicated a desire to plead guilty. (Tr., at 479:7-19). Apparently, the defendant wished to accept the (expired) second plea offer. (Tr., at 480:1-7). However, the government informed the Court that there was no open plea offer but that the defendant was welcome to plead guilty to the S-1 Indictment. (Tr., at 481:4-9). The defendant opted to continue with the trial. (Tr., at 481:16).

On the fourth day of trial, Ms. Dolan advised the Court that she had discussed the possibility of the defendant pleading open to the S-1 Indictment. (Tr., 597:12-21). But in open court, the defendant stated that rather than plead guilty at that point, he preferred to wait. (Tr., at 598:1-5). During the jury charge conference later that day, the defendant indicated that he wanted to plead guilty. (Tr., at 634:8-12). But after the government provided the Court and Ms. Dolan with a penalty sheet showing that the defendant's exposure was in the 360 months to life imprisonment range, the defendant again decided to continue with the trial. (Tr., at 639:19-25). After this, the Court stated, "I'm not entertaining any request to change a plea. The jury will decide this case." (Tr., at 640:6-15).

[2] Ms. Dolan informed the government that she relayed the second plea offer to the defendant and that the defendant declined it. Ms. Dolan declined the government's request for an affidavit to attest to these facts, but she stated that she would submit one if ordered to do so by the Court.

IV. The Defendant's Conviction and Sentencing

On December 15, 2017, after a five-day trial, the defendant was convicted of Counts One through Four of the S-1 Indictment. (PSR ¶ 1). The jury acquitted the defendant on Counts Five through Eight.

In the PSR, Probation recommended several adjustments for the defendant's sentence related to obstruction of justice. (PSR ¶¶ 20-21). In particular, the PSR noted that the defendant made various efforts to reach Jane Doe to prevent her from testifying. (PSR ¶ 21). He attempted to evade detection by using another inmate's telephone credit account at the Metropolitan Detention Center in Brooklyn, New York, to contact his mother and a friend to request they contact Jane Doe. Id. On one occasion, the defendant provided his mother with what he believed to be Jane Doe's telephone number and told his mother to contact "that person" to tell "her not to come across the pond for any reason and if need be[,] she should use her mental health to get out of it." Id. The government did not call Jane Doe as a witness. Id.

On Count One, the defendant was sentenced to two hundred and forty (240) months of imprisonment. (Judgment, ECF No. 124). On Count Two, the defendant was sentenced to four hundred and twenty (420) months of imprisonment. Id. On Count Three, the defendant was sentenced to one hundred and twenty (120) months of imprisonment. Id. On Count Four, the defendant was sentenced to three hundred and sixty (360) months of imprisonment. Id. The only count of conviction stemming exclusively from the S-1 Indictment was Count Four. (Compare ECF No. 9 with ECF No. 23). All sentences were ordered to run concurrently, meaning the defendant was sentenced to a total term of 420 months' imprisonment and 10 years' supervised release. (Judgment, ECF No. 124).

V. The Defendant's Appeal

The Second Circuit affirmed the judgment on appeal but declined to consider the defendant's claim of ineffective assistance of counsel. United States v. Price, 845 F. App'x 85, 87 (2d. Cir. 2021) (summary order).

VI. The Motion

The defendant now seeks to vacate his conviction under Section 2255, contending that: (1) he was denied effective assistance of counsel when his attorney failed to adequately inform him of the potential benefits and consequences of pleading guilty; and (2) he was denied effective assistance of counsel when his attorney failed to adequately negotiate a plea agreement on his behalf. Because his claims fail to satisfy the standard for relief, his motion should be denied. No hearing is necessary.

LEGAL STANDARD

A petitioner may bring an ineffective assistance of counsel claim whether or not the petitioner could have raised the claim on direct appeal. Yick Man Mui v. United States, 614 F.3d 50, 54 (2d Cir. 2010). For an ineffective assistance claim to be successful, the defendant must show "(1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that as a result he suffered prejudice." United States v. Jones, 482 F.3d 60, 76 (2d Cir. 2006) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The two-prong Strickland standard is "highly demanding." Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).

For a habeas petitioner to be successful under Strickland, he must prove that he was denied a fair trial because of his attorney's "gross incompetence." Id. A defendant is not entitled to a "modern-day Clarence Darrow"; mere competence suffices. United States v. Alessi, 638 F.2d 466, 477 (2d Cir. 1986). When assessing an attorney's performance for

competence, judicial scrutiny "must be highly deferential," and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Moreover, the attorney's actions must be evaluated "from [their] perspective at the time." Id. This ensures that hindsight bias does not distort a fair analysis of counsel's defense strategy. Id. There are "countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Id. This same analytical framework of strong deference to defense counsel's approach applies during plea negotiations. See Purdy v. United States, 208 F.3d 41, 45 (2d Cir. 2000).

Under Strickland, a petitioner must also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. Id. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome." Id. at 693. Instead, the "likelihood of a different result must be substantial." Harrington v. Richter, 562 U.S. 86, 112 (2011).

When a petitioner claims ineffective counsel in the context of a lost plea offer, they have the burden of showing a reasonable probability that they "would have accepted the offer to plead pursuant to the terms earlier proposed." Missouri v. Frye, 566 U.S. 134, 148 (2012).

When evaluating a claim of ineffective counsel, a court does not have to evaluate both Strickland prongs if the defendant fails to satisfy their burden of proof for either one. See Strickland, 466 U.S. at 697. Additionally, a court can examine either prong first. Id.

ARGUMENT

I. Counsel's Inability to Predict a Possible Superseding Indictment Did Not Amount to Gross Incompetence

The defendant's argument that his counsel provided ineffective assistance by failing to inform him that he could possibly face additional criminal charges pursuant to a superseding indictment should be denied. Even if counsel failed to warn the defendant of the possibility that the government could supersede the indictment, that failure could not have amounted to gross incompetence under Kimmelman.

A "lawyer's failure to foresee that the prosecutor would . . . bring additional charges does not mean she was ineffective." Whitehead v. Haggett, No. 12-CV-04946, 2017 WL 491651, at *12 (E.D.N.Y. Feb. 16, 2017) (Donnelly, J.). Superseding indictments are brought at the discretion of a prosecutor and in the secrecy of the grand jury. A defense counsel's inability to foresee the outcome of a secret proceeding that the defense counsel has no notice is taking place, and over which counsel has no control, cannot constitute ineffective assistance. Such a requirement on defense attorneys would go beyond the mere competence threshold. Alessi, 638 F.2d at 477.

As a factual matter, Mr. Branden could not recall whether he had warned the defendant of the risk of a superseding indictment. (Branden Aff., Ex. A at ¶ 24). But even if he did not predict a superseding indictment or warn the defendant of its possibility, failing to do so did not make Mr. Branden's representation deficient, and certainly not grossly incompetent. Counsel repeatedly and—in light of the jury verdict—wisely advised the defendant that he should accept a plea agreement. (Branden Aff., Ex. A at ¶ 20). The defendant made it clear that he would not ever accept a plea. (Branden Aff., Ex. A at ¶ 20). Although defense counsel plays a critical role in "the decision whether to plead guilty or contest a criminal charge," Boria v.

Keane, 99 F.3d 492, 497 (2d Cir. 1996) (internal quotation omitted), "the ultimate decision whether to plead guilty must be made by the defendant." Purdy, 208 F.3d at 45. The defendant made his choice. He cannot now shout baseless allegations of ineffective assistance to get a second try at a plea with the benefit of hindsight. Since he cannot establish deficient representation, he cannot establish ineffective assistance. Accordingly, his claim for relief should be denied.

II. Counsel's Alleged Errors Were Harmless

Even assuming that (1) counsel failed to advise his client of the possibility of a superseding indictment and (2) the failure to provide such a prediction amounted to objectively unreasonable assistance (it does not), any such errors are harmless, because the defendant fails to show that he was prejudiced in a way that would have changed the outcome of the case.

The defendant's sentence of 420 months' imprisonment and 10 years' supervised release was ultimately imposed based on the guilty verdict on Count Two of both the original Indictment and the S-1 Indictment. (Judgment, ECF No. 124). The original indictment exposed the defendant to 420 months of imprisonment or more. The plea agreement that the defendant complains he lost exposed the defendant to 420 months of imprisonment or more. And, of course, the S-1 indictment the defendant complains defense counsel incompetently failed to predict exposed the defendant to 420 months of imprisonment or more. 420 months was the sentence imposed. Accordingly, the defendant is unable to demonstrate that he was prejudiced by any error by counsel to predict the additional charges.

Moreover, to show prejudice from ineffective counsel that resulted in a lost plea offer, the defendant "must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." Missouri v. Frye, 566

U.S. 134, 147 (2012). On August 7, 2017, Mr. Branden presented the government's plea offer to the defendant. (Branden Aff., Ex. A at ¶ 5). The defendant does not dispute this. Instead, the defendant broadly claims that he "was prepared to [accept the August plea offer]" if he had known about the possibility of a superseding indictment. (Def. Mem. At 10). On the other hand, Mr. Branden recounts in detail each of the times he met with the defendant and how on each occasion the defendant repeatedly made clear that he would never plead guilty to the charges. (Branden Aff., Ex. A at ¶¶ 5, 17, 20). The defendant's conclusory claims should be rejected in comparison to the more detailed and consistent affidavit submitted by counsel. See, e.g., Chang v. United States, 250 F.3d 79, 86 (2d Cir. 2001) (affirming district court's refusal to hold an evidentiary hearing, and concluding: "Trial counsel's detailed description of events was eminently credible."); Riggi v. United States, No. 04-CV-7852, 2007 WL 1933934, at *8 (S.D.N.Y. July 5, 2007) (finding that counsel's affidavit "written in the first person, highly detailed, and internally logical" was more credible than the petitioner's conclusory allegations that did not give dates or locations of any conversations or detail the nature of such conversations); Kapelioujnyi v. United States, 779 F. Supp. 2d 250, 253 (E.D.N.Y. 2009) (Seybert, J.) (finding counsel's submission more credible than the petitioner where the petitioner made conclusory assertions, void of details concerning dates or locations). The fact that neither of the defendant's attorneys was able to convince the defendant to accept the government's plea offers further demonstrates that he was simply not interested in even entertaining the offers. (Branden Aff., Ex. A at ¶¶ 15, 20, 23).

The defendant points to trial transcripts to show that he was willing to accept a plea. (Def. Mem. at 14-19). But this evidence is not relevant to the current inquiry. By the time his trial had begun, the defendant had already rejected both plea offers. Then, on the last two

days of the trial—having seen the mounting and devastating evidence arrayed against him—the defendant indicated a willingness to plead guilty but retracted that willingness when he was reminded of his exposure. Although the defendant may wish to turn back the clock and accept the original offer now, the proper inquiry is whether he would have accepted the plea offer when it was made. See Lafler v. Cooper, 566 U.S. 156, 164 (2012).

Given the defendant's insistence that he would never accept a plea, even if the defendant were aware of the possibility of a superseding indictment, the evidence strongly suggests that he would not have accepted the plea offers when they were made. Thus, his claim for relief should be denied.

III. Counsel Adequately Negotiated a Plea Agreement on Defendant's Behalf

The defendant's secondary argument for relief contends that his counsel provided ineffective assistance by failing to adequately negotiate a plea agreement on his behalf. This claim should be denied because it is factually unsupported. (Def. Mem. at 2).

Strickland does not require that an attorney master the art of the deal; only competence is required. Alessi, 638 F.2d at 477; see also Purdy, 208 F.3d at 45 (quoting Strickland, 466 U.S. at 689, 693) (stating that counsel's legal strategy is owed substantial deference because "representation is an art"). The defendant's attorney met with the defendant every other week for several hours on average. (Branden Aff., Ex. A at ¶ 17). At the defendant's request, the defendant's attorney spoke with his mother on several occasions and met with her in person once. (Branden Aff., Ex. A at ¶ 18). On each of these occasions, the defendant's attorney explained the strength of the government's case and advised that the defendant accept a guilty plea offer. (Branden Aff., Ex. A at ¶¶ 20-21). Nonetheless, the defendant made clear that he would never plead guilty. (Branden Aff., Ex. A at ¶ 20). Even

with his client summarily rejecting his advice, the defendant's attorney continued to negotiate a better plea offer with the government. (Branden Aff., Ex. A at ¶¶ 19, 22). The defendant does not point to any facts that would support his claim that his attorney did not adequately negotiate a plea agreement. (Def. Mem. at 2). Nor does the defendant articulate the terms of a plea agreement that he would have accepted that the government was reasonably likely to offer. His claim relies on pure conjecture. Id. As a result, his claim for relief should be denied.

CONCLUSION

For the reasons set forth above, the defendant's 2255 motion on the basis of allegedly ineffective assistance of counsel should be denied in its entirety. No hearing is necessary.

Applicant Details

First Name	**Noah**
Last Name	**Chase**
Citizenship Status	**U. S. Citizen**
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Address	**Address** **Street** **811 Madison Ave., Apt #7** **City** **Albany** **State/Territory** **New York** **Zip** **12208** **Country** **United States**
Contact Phone Number	**6075917368**

Applicant Education

BA/BS From	**University of Minnesota-Twin Cities**
Date of BA/BS	**May 2020**
JD/LLB From	**Albany Law School** **http://www.albanylaw.edu/**
Date of JD/LLB	**May 19, 2024**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Albany Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Anthony V. Cardona Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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References

Please see attached reference list.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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811 Madison Ave., Apt #7, Albany, NY 12208

July 23, 2023

The Honorable James O. Browning
U.S. District Court, District of New Mexico
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Chief Judge Browning:

I am a rising third-year student at Albany Law School where I am the current Managing Editor of ALBANY LAW REVIEW and am in the top 22.8% of my class. I am writing to apply for a 2024–2025 clerkship in your chambers.

I am particularly interested in a clerkship with you due to your public service, my passion thereof, and enthusiasm towards the cases you handle. My experience in prior chambers, work through Law Review, my interest in litigation, and the societal-service judicial positions provide all bolster my interest in this clerkship. Further, I focus on living by my grandfather's words; he was public defender of the small town where I grew up, and once said, "Life without helping others is no life at all." Additionally, I pride myself in my eagerness to learn, to always be curious, and to rise to any challenge, traits which I will adamantly pursue to serve your chambers well.

Enclosed within, please find my resume, law school transcript, and writing samples. The first writing sample is a Habeas Corpus recommendation I drafted while interning with Judge Daniel J. Stewart of the United States District Court for the Northern District of New York. I received permission from Judge Stewart to use this as my writing sample. The second writing sample is my Note, which has been submitted in the Tannenwald Foundation Tax Writing Competition.

Professor Tenenbaum, Professor Hirokawa, Assistant United States Attorney Paul Bonanno, and Assistant United States Attorney Meghan Leydecker have written letters of recommendation in support of my candidacy. The contact information for these individuals is also provided in the enclosed list of references.

Please let me know if I can provide any additional information. Thank you for your consideration.

Sincerely,

Noah Chase

NOAH CHASE

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EDUCATION

ALBANY LAW SCHOOL OF UNION UNIVERSITY — Albany, NY
Candidate for Juris Doctor — May 2024

Class Rank:	*Top 22.8%* (GPA: 3.64).
Honors:	Executive Managing Editor, ALBANY LAW REVIEW VOL. 87
	Dean's List, Spring '22, Fall '22, & Spring '23
Awards:	Dale Van Epps '66 Memorial Scholarship
	Joseph C. Foiadelli Public Service Fellowship
Activities:	Research Assistant, Professor Patrick M. Connors
	Research Assistant, Professor Howard Zwickel
	Research Assistant, Professor Ray Brescia
	Teaching Assistant, Professor Evelyn Tenenbaum
	Teaching Assistant, Professor Keith Hirokawa
	Moot Court Board, Phi Alpha Delta, Criminal Law Society

UNIVERSITY OF MINNESOTA — Minneapolis, MN
Bachelor of Science, Sociology of Law, Criminology and Deviance; Minor: Philosophy — May 2020

Activities:	Student DJ, Radio K
	Founding Father, Vice President of Standards, Alpha Sigma Phi Fraternity
Study Abroad Program:	University of Auckland, Auckland, New Zealand, May 2018
Certifications:	Securities Industry Essentials; Life, Accident, Health Insurance License

EXPERIENCE

HON. MAE A. D'AGOSTINO, U.S. DISTRICT JUDGE — Albany, NY
Legal Intern — *To Commence* Aug. 2023

HODGSON RUSS — Albany, NY
Summer Associate — May 2023 – Present
- Rotational program throughout various practices groups, working for partners on substantive research, specifically in State and Local Tax and Litigation.

HON. DANIEL J. STEWART, U.S. MAGISTRATE JUDGE — Albany, NY
Legal Intern — Jan. 2023 – May 2023
- Aided in drafting, researching, and editing opinions and participated in discussions on decisions and case merits.

ALBANY COUNTY DISTRICT ATTORNEY'S OFFICE — Albany, NY
Legal Intern — Aug. 2022 – Dec. 2022
- Assisted in trial preparation, legal research, and memoranda drafting.
- Appeared on the record in bail application and detention hearings.

UNITED STATES ATTORNEY'S OFFICE, W.D.N.Y — Buffalo, NY
Summer Legal Intern — May 2022 – July 2022
- Completed legal research and writing, including investment fraud, evidentiary suppressions, and pleas.
- Worked with Assistant United States Attorneys on case development and formulation of legal strategy.

DAILYPAY, INC. — Minneapolis, MN
Customer Support Representative — Oct. 2020 – July 2021
- Handled high volume of calls and assisted clients in understanding complicated financial technology.

INVOLVEMENT

THE ADVOCATES FOR HUMAN RIGHTS — Minneapolis, MN
Court Monitoring Volunteer — Dec. 2019 – July 2021
- Tracked and recorded pertinent information, while observing a variety of court proceedings.

ROTARY INTERNATIONAL — Copenhagen, Den.
Short Term Youth Conference — Aug. 2018 – Sept. 2018
- Chosen to represent rotary clubs in an educational conference, participating in international dialogue.

CHASE, NOAH S. TRANSCRIPT OF RECORD ISSUED: 06/08/2023

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Page 1 of 1

Matriculated: 08/23/2021 Program: JD 3 Year Anticipated Degree Date: 05/24

FALL 2021 (08/23/2021 to 12/20/2021)

			CR.HR	GRADE	QPTS
CONX	CCHUN	Contracts	3.0	A-	11.1
CIVP	RQUEE	Federal Civil Procedure	4.0	B+	13.2
ILWF	LJIM	Introduction to Lawyering	3.0	B+	9.9
LWJS	AOUEL	Law & Justice:An Introduction	1.0	B	3.0
TORT	ETENE	Torts	4.0	A	16.0

Averaged: 15.00 Earned: 15.00 Q.Pts: 53.20

SEM: GPA 3.55 Rank 50/193 CUM: GPA 3.55 Rank 50/194

SPRING 2022 (01/18/2022 to 05/18/2022)

DEAN'S LIST

			CR.HR	GRADE	QPTS
CNSL	SCLAR	Constitutional Law	4.0	B	12.0
CONT	CCHUN	Contracts	2.0	B	6.0
CRIM	VBONV	Criminal Law	3.0	B+	9.9
ILWS	LJIM	Introduction to Lawyering	3.0	A	12.0
PROP	KHIRO	Property	4.0	A	16.0

Averaged: 16.00 Earned: 16.00 Q.Pts: 55.90

SEM: GPA 3.49 Rank 48/190 CUM: GPA 3.52 Rank 51/190

SUMMER 2022 (05/23/2022 to 07/15/2022)

			CR.HR	GRADE	QPTS
SPRA	DMANN	CLN-Summer in Prac(Fld Plcmt)	5.0	P	.....
SPRC	DMANN	CLN-Summer in Prc/Classroom	1.0	A	4.0
LPRF	CMAYE	Legal Profession	3.0	B-	8.1

Averaged: 4.00 Earned: 9.00 Q.Pts: 12.10

SEM: GPA 3.03 CUM: GPA 3.46

FALL 2022 (08/22/2022 to 12/21/2022)

DEAN'S LIST

			CR.HR	GRADE	QPTS
DAPL	RMERG	CLN:Alb Cnt DA FDPL Classroom	1.0	A	4.0
FDPL	JLCON	CLN:Field Placement	4.0	P	.....
FIRS	SCLAR	Con Law II: First Amendment	2.0	A+	8.6
CPIN	AFARL	Criminal Procedure:Investigtn	3.0	A-	11.1
EVDC	MHUTT	Evidence	4.0	A	16.0
SLTX	JBOLL	State and Local Taxation	2.0	A-	7.4

SPRING 2023 (01/16/2023 to 05/17/2023)

DEAN'S LIST

			CR.HR	GRADE	QPTS
ADEV	MHUTT	Advanced Evidence	2.0	A-	7.4
ANTR	ASEIT	Antitrust: Trade Practices	3.0	A	12.0
JDPL	RKRET	CLN: Judicial FDPL Classroom	1.0	A+	4.3
FDPL	JLCON	CLN:Field Placement	4.0	P	.....
LRME	VBONV	Law Review (Membership)	1.0	CR	.....
LRWT	VBONV	Law Review (Writing)	1.0	CR	.....
ELDT	JROSE	Law of Climate Chng:Dom/Trans	2.0	A	8.0
TRES	DPRAT	Trusts and Estates	3.0	A-	11.1

Averaged: 11.00 Earned: 17.00 Q.Pts: 42.80

SEM: GPA 3.89 Rank 30/188 CUM: GPA 3.64 Rank 43/188

TOTALS Averaged: 58.00 Earned: 73.00 Q.Pts: 211.10

Satisfied Upperclass Writing Requirement

STUDENT IN GOOD STANDING UNLESS OTHERWISE INDICATED

NOT VALID AS OFFICIAL WITHOUT SIGNATURE AND SEAL

Averaged: 12.00 Earned: 16.00 Q.Pts: 47.10

SEM: GPA 3.93 Rank 26/184 CUM: GPA 3.58 Rank 47/185

UNIVERSITY OF MINNESOTA
OFFICE OF THE REGISTRAR

TRANSCRIPT RECORD

Undergraduate Official

Name : Chase,Noah
Student ID : 5321752
Birthdate : 11 - 19

Print Date: 05/22/2023

MOST RECENT PROGRAMS

Campus : University of Minnesota, Twin Cities
Program : College of Liberal Arts
Plan : Sociology of Law, Criminology, and Deviance B S
Subplan : Organization, Business, or Non-Profit Track
Degree Sought : Bachelor of Science
Advisor : Butler,Daniel James
Plan : Philosophy Minor
Plan : Communication Studies Minor

- - - - - University of Minnesota Degrees and Certificates Awarded - - - - -

Degree: Bachelor of Science
Confer Date: 05/13/2020
Degree GPA: 2.927
Acad Program: College of Liberal Arts
Plan: Sociology of Law, Criminology, and Deviance B S
Sub-Plan: Organization, Business, or Non-Profit Track
Plan: Philosophy Minor

Transfer Credits
Transfer Credit from Tompkins-Cortland Community College
Semester Transfer Totals: 35.000

*** * * * * Beginning of Undergraduate Record * * * * ***

Fall Semester 2016
University of Minnesota, Twin Cities
College of Liberal Arts
Sociology of Law, Criminology, and Deviance B S
Organization, Business, or Non-Profit Track

Course		Description	Attempted	Earned	Grade	Points
CLA	1001	CLA First-Year Experience I	1.00	1.00	S	0.000
GEOG	1403	Biogeography	4.00	4.00	D+	5.332
POL	1025	Global Politics	4.00	4.00	C+	9.332
SOC	3101	Soc Persp on Crim Justice Sys	3.00	3.00	B	9.000
SW	2501W	Introduction to Social Justice	4.00	4.00	A	16.000
TERM GPA : 2.644		TERM TOTALS :	16.00	16.00	15.00	39.664

Spring Semester 2017
University of Minnesota, Twin Cities
College of Liberal Arts
Sociology of Law, Criminology, and Deviance B S
Organization, Business, or Non-Profit Track

Course		Description	Attempted	Earned	Grade	Points
ACCT	2050	Intr Financial Rptg	4.00	4.00	C-	6.668
ANTH	1003W	Understanding Cultures	4.00	4.00	B+	13.332
CLA	1002	CLA First-Year Experience II	1.00	1.00	S	0.000
ID	3205	Law School Exploration	2.00	2.00	A-	7.334
MATH	1142	Short Calculus	4.00	0.00	D	0.000
Repeated:		Repeated - Exclude from GPA				
SOC	3811	Social Statistics	4.00	4.00	A	16.000
TERM GPA : 3.095		TERM TOTALS :	19.00	15.00	14.00	43.334

Fall Semester 2017
University of Minnesota, Twin Cities
College of Liberal Arts
Sociology of Law, Criminology, and Deviance B S
Organization, Business, or Non-Profit Track

Course		Description	Attempted	Earned	Grade	Points
ANSC	1701	Historical Influence of Horse	3.00	3.00	A-	11.001
FINA	3001	Finance Fundamentals	0.00	0.00	W	0.000
INS	4100	Corp Risk Mgmt	2.00	2.00	B-	5.334
SOC	3701	Social Theory	4.00	4.00	B+	13.332
SOC	3801	Sociological Research Methods	4.00	4.00	A	16.000
SOC	4161	Criminal Law	3.00	3.00	A-	11.001
TERM GPA : 3.542		TERM TOTALS :	16.00	16.00	16.00	56.668

Spring Semester 2018
University of Minnesota, Twin Cities
College of Liberal Arts
Sociology of Law, Criminology, and Deviance B S
Organization, Business, or Non-Profit Track

Course		Description	Attempted	Earned	Grade	Points
ABUS	4022W	Management in Organizations	3.00	0.00	D	0.000
Repeated:		Repeated - Exclude from GPA				
PHIL	4101	Metaphysics	3.00	3.00	B-	8.001
SOC	3412	Social Networking	3.00	3.00	B	9.000
SOC	4162	Criminal Procedure	3.00	3.00	A-	11.001
SOC	4411	Terrorist Networks	3.00	3.00	A-	11.001
TERM GPA : 3.250		TERM TOTALS :	15.00	12.00	12.00	39.003

Summer Semester 2018
University of Minnesota, Twin Cities
College of Liberal Arts
Sociology of Law, Criminology, and Deviance B S
Organization, Business, or Non-Profit Track

Course		Description	Attempted	Earned	Grade	Points
SOC	3641	New Zealand Cltr, Society, Env	3.00	3.00	B+	9.999
"SOC 3641" COMPLETED ON THE GLOBAL SEMINAR: UNDERSTANDING NEW ZEALAND: CULTURE, SOCIETY, & ENVIRONMENT - MAY TERM 2018 PROGRAM IN VARIOUS CITIES, NEW ZEALAND						
TERM GPA : 3.333		TERM TOTALS :	3.00	3.00	3.00	9.999

Fall Semester 2018
University of Minnesota, Twin Cities
College of Liberal Arts
Sociology of Law, Criminology, and Deviance B S
Organization, Business, or Non-Profit Track
Philosophy Minor

Course		Description	Attempted	Earned	Grade	Points
COMM	3411	Small Group Commun	3.00	3.00	A	12.000
MATH	1142	Short Calculus	4.00	4.00	C	8.000
PHAR	1002	Medical Terminology	2.00	2.00	A-	7.334
PHIL	3302W	Moral Probs:Contemp Society	4.00	4.00	C+	9.332
PHIL	4605	Space and Time	3.00	3.00	D	3.000
TERM GPA : 2.479		TERM TOTALS :	16.00	16.00	16.00	39.666

Noah Chase
112 West Malloryville Rd
Freeville NY 13068

Susan Van Voorhis, Registrar
University of Minnesota, Twin Cities

UNIVERSITY OF MINNESOTA
OFFICE OF THE REGISTRAR

TRANSCRIPT RECORD

Undergraduate Official

Name : Chase,Noah
Student ID : 5321752
Birthdate : 11 - 19

Spring Semester 2019
University of Minnesota, Twin Cities
College of Liberal Arts
Sociology of Law, Criminology, and Deviance B S
Organization, Business, or Non-Profit Track
Philosophy Minor

Course		Description	Attempted	Earned	Grade	Points
ABUS	4022W	Management in Organizations	3.00	3.00	D+	3.999
JWST	3515	Multiculturalism in Israel	3.00	3.00	A-	11.001
PHIL	3304	Law and Morality	4.00	4.00	B	12.000
PHIL	5415	Phil of Law	3.00	3.00	B+	9.999
SOC	4101W	Sociology of Law	3.00	3.00	B	9.000
TERM GPA :	2.875	TERM TOTALS :	16.00	16.00	16.00	45.999

Fall Semester 2019
University of Minnesota, Twin Cities
College of Liberal Arts
Sociology of Law, Criminology, and Deviance B S
Organization, Business, or Non-Profit Track
Philosophy Minor
Communication Studies Minor

Course		Description	Attempted	Earned	Grade	Points
COMM	1313W	Analysis of Argument	3.00	3.00	A-	11.001
COMM	3201	Electronic Media Production	4.00	4.00	B	12.000
COMM	3401	Intro to Communication Theory	3.00	3.00	D	3.000
LAW	3000	Introduction to American Law	3.00	3.00	C	6.000
SMGT	3861	Sport and Recreation Law	3.00	3.00	B-	8.001
TERM GPA :	2.500	TERM TOTALS :	16.00	16.00	16.00	40.002

Spring Semester 2020
University of Minnesota, Twin Cities
College of Liberal Arts
Sociology of Law, Criminology, and Deviance B S
Organization, Business, or Non-Profit Track
Philosophy Minor
Communication Studies Minor

Course		Description	Attempted	Earned	Grade	Points
BLAW	3058	Law of Contracts and Agency	4.00	4.00	B	12.000
COMM	3601	Intro: Rhet Theory	3.00	3.00	S	0.000
COMM	5441	Comm in Human Organizations	3.00	3.00	B-	8.001
SOC	4966W	Capstone Experience: Seminar	3.00	3.00	A-	11.001
WRIT	3441	Editing, Critique & Style	3.00	3.00	S	0.000

Due to the COVID-19 pandemic, Satisfactory/Not Satisfactory grading permitted for many classes and degree requirements.

TERM GPA :	3.100	TERM TOTALS :	16.00	16.00	10.00	31.002

Undergraduate Career Totals

CUM GPA:	2.927	UM TOTALS:	133.00	126.00	118.00	345.337
		UM + TRANSFER TOTALS:		161.00		

***** End of Transcript *****

Susan Van Voorhis, Registrar
University of Minnesota, Twin Cities

Transcript key

Academic calendar

The semester system started Fall 1999 for all University of Minnesota campuses. Prior to Fall 1999 the University used a quarter system with these exceptions: Law school started on semesters Fall 1981, and some College of Continuing Education courses were taught on a semester calendar but the credits reported as quarter credits.

Accreditation

The University of Minnesota is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools.

Course (class) numbering system (from Fall 1999)

0000 to 0999 remedial courses
1000 to 1999 primarily for undergraduates in first year
2000 to 2999 primarily for undergraduates in second year
3000 to 3999 primarily for undergraduates in third year
4000 to 4999 primarily for undergraduates in fourth year, may be applied to a Graduate School degree with approval by the student's major field and if taught by a member of the graduate faculty or an individual authorized by the program to teach at the graduate level
5000 to 5999 primarily for graduate students but third and fourth year undergraduates may enroll
6000 to 7999 for postbaccalaureate professional degree students
8000 to 9999 for graduate students

Prior course numbering systems

For Fall 1970 through Summer 1999 (course numbering prior to 1970 is noted in parentheses):
0000 to 0999 noncredit courses
1000 to 1999 (01 - 49) introductory courses primarily for freshmen and sophomores
3000 to 3999 (50 - 99) intermediate courses primarily for juniors and seniors
5000 to 5999 (100 - 199) advanced courses for juniors, seniors, and graduate students
8000 to 8999 (200 and higher) for graduate and professional school students

Credit

Starting Fall 1999 – units are semester credit
Prior to Fall 1999 – units generally are quarter credit (see calendar for exceptions)
Thesis credit – an asterisk (*) will appear following the course title of courses numbered 8777, 8888, or 8999 if the degree award is shown
An asterisk (*) indicates graduate credit taken though College of Continuing Education (Continuing Education and Extension prior to Fall 1999)

Grading policy (complete)

Available online at policy.umn.edu/Policies/Education/Education/GRADINGTRANSCRIPTS.html

Grading definitions

A – achievement that is outstanding relative to the level necessary to meet course requirements
B – achievement that is significantly above the level necessary to meet course requirements
C – achievement that meets the course requirements in every respect
D – achievement that is worthy of credit even though it fails to meet fully the course requirements
E – achievement that is significantly greater than the level required to meet the basic course requirements but not judged to be outstanding
F (or N) – represents failure (or no credit) and signifies that the work was either (1) completed but at a level of achievement that is not worthy of credit or (2) was not completed and there was no agreement between the instructor and the student that the student would be awarded an I (see also I)
H – Honors (used by Law School and Medical School only)
I – (Incomplete) assigned at the discretion of the instructor when, due to extraordinary circumstances, e.g., hospitalization, a student is prevented from completing the work of the course on time. Requires a written agreement between instructor and student
K – assigned by an instructor to indicate the course is still in progress and that a grade cannot be assigned at the present time
LP - low pass (used by Law School only)
NG –no grade required
NR - grade not reported
O – represents outstanding achievement for Doctor of Medicine and Doctor of Veterinary Medicine programs
P – achievement designating passing work
Q – achievement designating passing work
R – a course related registration symbol
S – achievement that is satisfactory, which is equivalent to a C- or better for undergraduate students (C or better on the Duluth campus). Graduate and professional programs may establish higher standards for earning a grade of S.
T – test credit
V – registration as an auditor or visitor (a non-grade non-credit registration)
W – entered by the registrar's office when the student officially withdraws from a course after the second week
X – reported by the instructor for a student in a sequence course where the grade cannot be determined until the sequence is complete – the instructor is to submit a grade for each X when the sequence is complete
Y – assigned from Fall 1929 to Summer 1959 to indicate the student canceled while doing passing work
Z – assigned from Fall 1929 to Summer 1959 to indicate the student canceled while doing failing work

On the Twin Cities campus from Fall 1972 through Summer 1977 and on the Morris campus from Fall 1972 through Summer 1985, the official University transcript included only positive academic achievements. Courses in which the student received a grade of N or a registration symbol of I or W did not appear on the transcript.

Grade/Numeric Point Average formula

Effective Fall 1997, grade point values were standardized for the University. All units except Law use: A = 4.000, A- = 3.667, B+ = 3.333, B = 3.000, B- = 2.667, C+ = 2.333, C = 2.000, C- = 1.667, D+ = 1.333, D = 1.000, F = 0.000, I = 0.000, K = 0.000, X = 0.000. Effective Fall 2004, the Twin Cities campus Law School uses University standard grading, with the addition of A+ = 4.333 and excluding D+.
Before 1997, most units did not use +/-. But the Duluth campus and the School of Management used: A = 4.0, A- = 3.6, B+ = 3.3, B = 3.0, B- = 2.6, C+ = 2.3, C = 2.0, C- = 1.6, D+ = 1.3, D = 1.0, F = 0.0 and the Twin Cities General College used A = 4.0, A- = 3.6, B = 3.2, B- = 2.8, C+ = 2.4, C = 2.0, C- = 1.6, D = 1.2, D- = 0.8, F = 0.0
Prior to Fall 2004, the Twin Cities campus Law School used a numeric rather than a grade point average for the *juris doctor (J.D.)* degree program. Grades ranged from 4-16 points based on the following: 14-16: Excellent/Outstanding; 11-13: Substantially better than average; 8-10: Minimally acceptable; 5-7: Inadequate (credits count towards degree completion, and NPA); 4: Failing; 0: Non-performance. Classes for which a 0 grade was earned are not included in NPA calculation. Grades earned in the *LL.M.* (Master of Laws) program were: A=4.00, B=3.00, C=2.00, D=1.00, F=0.00. No +/- distinctions are given.

Symbols following course numbers

C – certificate credit
E – on Duluth campus, registration in Continuing Education, or on Twin Cities campus, an MBA course
G – honors course for extra credit
H – honors course
J – evening MBA course for extra credit
K – evening MBA course by independent study
L – honors course by independent study
M – extra credit by independent study
Q – evening MBA extra credit by independent study
R – honors extra credit by independent study
S – semester registration (pre-1999)
T – semester honors course (pre-1999)
U – special term course taken for extra credit
V – honors and writing intensive
W – writing intensive
X – extra credit
Y – independent study
Z – special term registration

Additional notations

Canceled means that all course registration was canceled (i.e., dropped) before the end of the second week of the term.

Degree with distinction indicates graduation with high GPA; **degree with honors** (laude) indicates completion of honors program.

Second Language Proficiency means demonstrated intermediate proficiency in reading, writing, listening, and speaking.

For more information, visit www.umn.edu

Campus records office locations:

University of Minnesota, Crookston
9 Hill Hall
Crookston, MN 56716-5001
218-281-8548
Dept of Educ Inst cd: 004069

University of Minnesota, Duluth
184 Darland Administration Building
Duluth, MN 55812-3011
218-726-8000
Dept of Educ Inst cd: 002388

University of Minnesota, Morris
212 Behmler Hall
Morris, MN 56267-2132
320-589-6030
Dept of Educ Inst cd: 002389

University of Minnesota, Twin Cities
333 Science Teaching & Student Services
Minneapolis, MN 55455
612-624-1111
or
130 Coffey Hall
St. Paul, MN 55108
612-624-1111
or
130 West Bank Skyway
Minneapolis, MN 55455
612-624-1111
Dept of Educ Inst cd: 003969

University of Minnesota, Rochester
111 South Broadway
Rochester, MN 55904
507-258-8457
Dept of Educ Inst cd: 003969

The University of Minnesota, Waseca campus closed in 1992. For information on Waseca student transcripts, contact the St. Paul office.

NOAH CHASE
nchase@albanylaw.edu □ (607) 591-7368 □ linkedin.com/in/noahschase

Your Honor:

The list of references below corresponds with the letters of recommendation arriving separately to your chambers. These individuals also serve as references.

Professor Evelyn Tenenbaum
Albany Law School
518-445-3375
etene@albanylaw.edu

Professor Keith Hirokawa
Albany Law School
518-445-3360
khiro@albanylaw.edu

Mr. Paul Bonanno
USAO – Western District, N.Y.
716-843-5700
Paul.Bonanno@usdoj.gov

Ms. Meghan Leydecker
USAO – Western District, N.Y.
716-843-5821
Meghan.Leydecker@usdoj.gov

Please let me know if I can provide any additional information. Thank you for your consideration.

Sincerely,

Noah Chase

U.S. Department of Justice

United States Attorney
Western District of New York

Federal Center
138 Delaware Avenue
Buffalo, New York 14202

716/843-5700
fax 716/551-3052
Writer's Telephone: 716/843-5821
Writer's fax: 716/551-3196
Meghan.Leydecker@usdoj.gov

May 2, 2023

To Whom it May Concern:

I am writing on behalf of Noah Chase regarding his judicial clerkship application. I am currently the Deputy Chief of the Narcotics and Organized Crime Section for the United States Attorney's Office in the Western District of New York. During the Summer of 2022, I was responsible for coordinating the Summer Law Clerk program for our district. Noah was one of our summer clerks. During the ten-week summer program, I became familiar with Noah and his abilities.

Noah's strong work ethic and determination were on display throughout his clerkship. He was diligent in completing assignments and acted responsibly and professionally in our workplace. Our clerkship offers opportunities for legal research and writing on both federal criminal and civil practice issues. Law clerks also have the ability to observe court proceedings and participate in law enforcement and witness preparation meetings. Noah was engaged in each of his assignments and invested in learning as much as possible throughout the summer.

Noah exhibited a curiosity for the subject matter that, in my experience, is rarely encountered with law students in this arena. He asked probing questions and frequently demonstrated his familiarity with the subject matter. Noah was a pleasure to supervise during his time with the US Attorney's Office.

I believe that Noah would be successful as a judicial law clerk and an asset at the position. He has proven to be a highly diligent and professional employee, but is also devoted to pursuing justice and, more simply, doing the right thing. That combination of attributes would suit him well to hold such an important position within the judicial system. If you have any questions, please contact me at the above phone number or email address.

Sincerely,

TRINI E. ROSS
United States Attorney

Meghan Leydecker
BY: MEGHAN LEYDECKER
Assistant United States Attorney

ALBANY LAW SCHOOL

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
TEL: 518-445-3360
FAX: 518-472-5878 WWW.ALBANYLAW.EDU

Keith Hirokawa
Associate Dean of Research and Scholarship and Distinguished Professor of Law
khiro@albanylaw.edu

April 29, 2023

Re: Noah Chase

To Whom It May Concern:

I am so pleased to write this letter in support of Noah Chase as an applicant for a judicial clerkship. Noah has consistently demonstrated the highest personal standards of achievement, a productive work ethic, and a contagious sense of professionalism. Noah is extremely talented and I believe he would make an excellent judicial law clerk.

In his first year of law school, Noah quickly mastered lawyering skills: effective research and critical comprehension of case law and policy; a deep understanding of complex jurisprudential perspectives; and, the ability to clearly communicate his research findings, both orally and in written memoranda. I have since asked Noah to work with me as my teaching assistant for Property, and his assistance has had a remarkable impact on the confidence and competence of the first-year students.

Noah's accomplishments and his strong sense of professionalism have been acknowledged by his peers and my colleagues. He is driven by the value of deliberate and intentional dialogue. His teaching style illustrates inclusive communication and respect for others. Property students regularly report on the benefits of his assistance. He is accessible, thoughtful, and insightful. Noah always goes beyond what is required. He will be an excellent judicial law clerk.

Thank you for allowing me the opportunity to support Noah in this way. I am happy to be available at your convenience to discuss any questions or concerns that you may have.

Sincerely,

Keith Hirokawa

Keith H. Hirokawa

July 24, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing this letter of recommendation for Noah Chase, a rising third-year student at Albany Law School. During his first year at Albany Law, Noah was a student in my Torts class and during his second year, he was a teaching assistant for that class. As you can tell from this history, I think very highly of Noah, both as a scholar and person and am delighted to have this opportunity to tell you about him.

Noah did very well in my Torts class. In fact, he did so well that I hired him to be my teaching assistant. Noah's comments in class were consistently thoughtful and articulate and demonstrated his strong grasp of the subject matter. In addition, his exam highlighted his strong analytical skills and writing ability. Noah also shone as my teaching assistant. In that role, he co-taught two review sessions, commented on student papers, and met with students on an individual basis. In performing these tasks, Noah was very well-organized and detail oriented. He was always the first to let me know if a student had some concern that only I could help with and to remind me – at my request – if something needed to be done. He also has terrific interpersonal and analytical skills and worked very well with my other two teaching assistants and with the students. In addition, Noah volunteered to help write one of the practice assignments I hand out to the students during the semester even though I generally create those assignments myself. He worked with another of the teaching assistants on that project and the problem they designed was very well-done and performed its teaching purpose beautifully. On top of that, the students really enjoyed the assignment. On my end-of-the semester teaching evaluations, students in the class rarely comment on the performance of the teaching assistants, but this year, my Torts students made the extra effort of calling out the TAs for their help with Torts concepts and with navigating the first year of law school.

Noah is a very good choice for a judicial clerkship. Not only does he have the analytical, writing, and oral skills to be an excellent student and teaching assistant, but he has also demonstrated his interest in a judicial clerkship by clerking during law school for the Hon. Daniel J. Stewart, a Magistrate Judge in the Northern District of New York. Although he is only a second-year law student, Noah has also gained practical experience working for the Albany County District Attorney's Office and the U.S. Attorney's Office for the Northern District of New York. Next year, he will further his skills by acting as Executive Managing Editor of the Albany Law Review. Noah is also focused on obtaining a clerkship, which he believes will allow him to expand his skills and gain perspective on his future career.

I highly recommend Noah for a judicial clerkship. Besides being an excellent student, he is dependable, motivated, enthusiastic, and a real pleasure to work with. If you would like any further information, please feel free to contact me.

Very truly yours,

Evelyn M. Tenenbaum
Professor of Law
etene@albanylaw.edu
518-445-3375

U.S. Department of Justice

United States Attorney
Western District of New York

Federal Center
138 Delaware Avenue
Buffalo, New York 14202

716/843-5700
fax 716/551-3052
Writer's Telephone: 716/843-5873
Paul.Bonanno@usdoj.gov

May 26, 2023

To Whom It May Concern,

I write to recommend Noah Chase for a position as a judicial clerk. Noah worked closely with me during the summer of 2022 while he was interning in my office. Most significantly, Noah worked with me on a complicated securities fraud investigation relating to a public company. The alleged fraud spanned a number of years and involved complicated securities transactions. Over the course of the summer, I asked Noah to research several difficult legal issues related to potential securities fraud charges. This research required Noah to delve into stock registration requirements, rules related to private placements of stock, and implications of delisting stock. No matter how complex the issue, Noah enthusiastically and capably took on the assignment. He ultimately wrote several helpful memoranda in which he cogently analyzed the relevant statutes and case law. Noah also examined a number of dense SEC filings related to the public company and was able to summarize the filings clearly and concisely. In short, while still only a law student, Noah provided invaluable assistance over the summer.

In addition, throughout his time with my office, Noah acted professionally and demonstrated the judgment and temperament necessary to be a successful judicial clerk and lawyer. He also demonstrated true passion for public service. I think Noah is an outstanding candidate to be a judicial clerk and I highly recommend him.

Very truly yours,

PAUL E. BONANNO
Assistant United States Attorney

NOAH CHASE
WRITING SAMPLE

nchase@albanylaw.edu · (607) 591-7368 · linkedin.com/in/noahschase

The attached writing sample is an excerpt from a Habeas Corpus Report and Recommendation Memorandum that I drafted while interning for the Honorable Daniel J. Stewart, Magistrate Judge for the United States District Court for the Northern District of New York.

I was the sole author and editor of the selected portion and have received permission from Judge Stewart's chambers to use this Memorandum as a writing sample. Any changes made were to either: preserve confidentiality prior to publication, pending District Judge review; or, for the purposes of adopting this Memorandum to be used as a writing sample. Footnotes have been added in some sections to aid in the understanding of this excerpt. All deviations from Bluebook citations were according to the chamber's style guide rules. Finally, any errors are my own, and not a reflection of Judge Stewart's chambers.

The selected portion examines Petitioner's claims of ineffective assistance of counsel; both of his trial counsel and his appellate counsel. The entirety of the drafted opinion was thirty-three pages and analyzed six claims raised by Petitioner. The report recommended denying the Petition. Petitioner's six claims for Habeas review were: (1) the People failed to prove that the "rifle" Petitioner possessed was a "semiautomatic" weapon; (2) the trial court failed to instruct the jury on all the elements of criminal possession of a weapon; (3) the conviction violated his Second Amendment rights; (4) the evidence seized was a violation of his Fourth Amendment rights; (5) he was denied effective assistance of trial counsel; and (6) he was denied effective assistance of appellate counsel.

The basis of this habeas petition was Petitioner's conviction of second-degree criminal possession of a weapon and second-degree reckless endangerment. Petitioner and another individual shot at each other outside an apartment complex, leading to Petitioner's apprehension and subsequent indictment.

E. Claim Five: Effective Assistance of Trial Counsel

The Supreme Court, in *Strickland v. Washington*, set the standard for ineffective assistance of counsel, where it was required to consider if the Constitution demanded that a criminal defendant's conviction must be "set aside because counsel's assistance at trial or sentencing was ineffective." 466 U.S. 668, 671 (1984). From *Strickland*, and lasting still, the requirements for such a claim are that "[t]he defendant must show that there is a reasonable probability that, *but for counsel's unprofessional errors*, the result of the proceeding would have been different." *Id.* at 694 (emphasis added). Further, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695. The *Strickland* decision set forth two specific ideations from which such claims are analyzed through: First, the defendant must show that his attorney's actions "were outside the wide range of professionally competent assistance," rather than potentially strategic decisions. *Id.* at 690–91. Second, it must be shown that these actions had an "effect on the judgment." *Id.*

The first prong of the *Strickland* analysis "is necessarily linked to the practice and expectations of the legal community," to which the Court has

"long recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . .'" *Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010) (quoting *Strickland v. Washington*, 466 U.S. at 688) (collecting cases). Such guides are important measures of the legal community and the "prevailing professional norms" of what is effective representation, to compare against what is not. *See id.* at 367. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance, and [the Court has] held that a lawyer's violation of ethical norms does not make the lawyer *per se* ineffective." *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (citing *Mickens v. Taylor*, 535 U.S. 162, 171 (2002)); *see also Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Therefore, it follows that Petitioner must demonstrate that his counsel's errors were such that counsel was effectively unreasonable. *See Harrington v. Richter*, 562 U.S. 86, 104 (2011) ("The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" (quoting *Strickland v. Washington*, 466 U.S. at 687)).

The second prong of the *Strickland* analysis requires that the challenger shows that "[c]ounsel's errors [were] 'so serious as to deprive the

defendant a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 687). This standard is high, and high for a reason as such claims "can function as a way to escape rules . . . and raise issues not presented at trial." *Id.*; *see also Padilla v. Kentucky*, 559 U.S. at 357 ("Surmounting *Strickland*'s high bar is never an easy task."). Such standard "must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the vary adversary process the right to counsel is meant to serve." *Harrington v. Richter*, 562 U.S. at 105 (quoting *Strickland v. Washington*, 466 U.S. at 689–90). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. at 8 (citing *Strickland v. Washington*, 466 U.S. at 690). This "presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" *Id.* (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). "After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better." *Harrington v. Richter*, 562 U.S. at 109. This prejudicial prong does not ask "whether it is possible a reasonable doubt might have been established if counsel acted differently[;]"

instead, "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Id.* at 111–12 (internal citations omitted) (first citing *Wong v. Belmontes*, 558 U.S. 15, 27 (2009); and then quoting *Strickland v. Washington*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112 (citing *Strickland v. Washington*, 466 U.S. at 693).

Petitioner reiterates his prior claims[1] and assigns fault for each of them not being raised to his counsel at trial. *See* Pet. Mem. at 57–67.[2] Without belaboring the above discussions, it is under the *Strickland* analysis which each of these points must be decided; whether counsel's actions would be considered reasonable to the legal profession, and if such actions deprived Petitioner of a fair trial, having an effect on the outcome. *See Strickland v. Washington*, 466 U.S. at 687–88, 693. As evidenced by the legal considerations to each of Petitioner's four prior points, the arguments which Petitioner now assigns blame onto his trial counsel are unreasonable and must fail as a matter of law. Finding such, it cannot be said that Petitioner's

[1] Petitioner raised four other claims, prior to this one, and each was again repeated within his claim of ineffective assistance of counsel. Each prior claim was analyzed through the legal and procedural standards set forth by 28 U.S.C. § 2254 and the Antiterrorism and Effective Death Penalty Act of 1996. Petitioner's prior claims were: (A) the rifle in his possession was not a semiautomatic weapon; (B) the trial jury instructions lacked all the elements of the charged crime; (C) the charged crime violated his Second Amendment rights; and (D) Petitioner's Fourth Amendment rights were violated.

[2] Citations to the Petitioner's Memorandum of Law is in the form of "Pet. Mem." followed by the page numbers assigned by the Court's CM/ECF system.

trial counsel failed to raise arguments, motions, or objections which this Court finds unsupported in its analysis. Petitioner argues his counsel's "failure to request the statutory definition of 'semiautomatic' and the exceptions included in the definition of an assault weapon" and "failure to object to erroneous jury instructions and trail court's abuse of discretion in ruling that the expectations to the assault weapon had to be raised as an affirmative defense" create an ineffective assistance of counsel claim. Pet. Mem. at 60, 61. Yet such claims are without merit, as discussed above, and had counsel raised either issue no change in the outcome would have occurred specifically for that such reason.

Penultimately, Petitioner misunderstands trial testimony and argues that his counsel's failure to "object to the prosecution's use of inadmissible hearsay [evidence] violated Petitioner's clearly established right to confront witnesses against him." Pet. Mem. at 64. Petitioner argues that Officer [redacted]'s testimony of what Ms. [redacted] told him was inadmissible hearsay; yet, at trial, the prosecution asked Officer [redacted] "With what authority did you have to enter [the apartment]?" to which Officer [redacted] replied, "[redacted] gave us permission to enter." SR. at 316.[3] This is not hearsay, as hearsay "evidence [i]s testimony in court . . . of a statement made out of court,

[3] Citations to the state court record is in the form of "SR." followed by the page numbering provided by Respondent.

the statement being offered as an assertion to show the truth of matters asserted therein." *Ohio v. Roberts*, 448 U.S. 56, 62 n.4 (1980). No statement was offered by Officer [redacted] to be accepted as true, rather being offered to illustrate Officer [redacted]'s state of mind, and such difference exemplifies the misunderstanding which underlies Petitioner's claim. *Compare id.*, *with* SR. at p. 316.

Finally, Petitioner argues that his counsel's "failure to object to [the] trial court's failure to rule on [his] motion for a trial order of dismissal" rose to the level of ineffectiveness. *See* Pet. Mem. at p. 66–67. After the prosecution rested, Petitioner's counsel moved for a "trial order of dismissal" arguing that the prosecution "failed to establish the necessary elements in each and every count." SR. at p. 395–96. As evidenced by the record, this motion was denied. *See* SR. at p. 396–98. The trial judge reserved a portion pertaining to the jury instructions, a point which was later revisited after the defense rested, where such portion was subsequently denied. *Compare* SR. at p. 398, *with* SR. at p. 405–08. Both of these motions represent Petitioner's counsel acting diligently to represent Petitioner; the denials of said motions do not present any prejudicial acts from which Petitioner can base an ineffective assistance of counsel claim, nor would such acts constitute requisite deprivation of a fair trial. *See Strickland v. Washington*, 466 U.S at 687–88, 693.

Absent any showing that conduct by Petitioner's trial counsel was unreasonable for an attorney in such a position, and that such conduct rose to the level proscribed by *Strickland*, Petitioner's claim of ineffective assistance of counsel must fail.

F. Claim Six: Effective Assistance of Appellate Counsel

While the Supreme Court has stated that "[t]here is . . . no constitutional right to an appeal" it has also held "that a state must provide counsel for an indigent appellant on his first appeal as of right." *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also Entsminger v. Iowa*, 386 U.S. 748, 751 (1967). The *Strickland* analysis and standard is applicable to appellate counsel. *See Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) ("[T]he *Strickland* test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, [and] the same test is used with respect to appellate counsel." (citing *Claudio v. Scully*, 982 F.2d 798, 803 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2347 (1993); *Abdurrahman v. Henderson*, 897 F.2d 71, 74 (2d Cir. 1990))). Therefore, the Petitioner "must establish that (1) the attorney's representation fell below an objective standard of reasonableness; and (2) the deficient representation prejudiced the defense." *Sellan v. Kuhlman*, 261 F.3d 303, 315 (2d Cir. 2001) (citing *Strickland v. Washington*, 466 U.S. at 687); *see also Hemstreet v. Greiner*, 491 F.3d 84, 89

(2d Cir. 2007); *Greiner v. Wells*, 418 F.3d 305, 313 (2d Cir. 2005); *Eze v. Senkowski*, 321 F.3d 110, 137 (2d Cir. 2003). While the standard from *Strickland* is maintained, the application to appellate counsel is slightly different; especially due to the noted differences in procedure, and "when [the time for] oral argument is strictly limited . . . and when page limits on briefs are widely imposed." *See Jones v. Barnes*, 463 U.S. at 753 (citing Fed. Rule App. Proc. 28(g)); *see also Davila v. Davis*, 137 S. Ct. at 2066 ("The criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not.").

To reiterate, when determining whether an attorney's representation is deficient, "courts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Bloomer v. United States*, 162 F.3d 187, 192–93 (2d Cir. 1998) (quoting *Strickland v. Washington*, 466 U.S. at 689). "[T]he presumption of reasonableness afforded an appellate attorney can be overcome if he neglected to raise significant and obvious issues while pursuing substantially weaker ones." *Id.* at 193 (citing *Mayo v. Henderson*, 13 F.3d at 533). To demonstrate "appellate counsel's failure to raise a state claim constitute[d] deficient performance" *Mayo v. Henderson*, 13 F.3d at 533, Petitioner must show that counsel "ignored issues [which were] clearly stronger than those presented." *Gray v. Greer*, 800 F.2d

644, 646 (7th Cir. 1985) (citing *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991)). This is notably a high standard, one that is made more difficult due to the appellate procedure, especially as, if counsel had a duty to "raise every 'colorable' claim suggested by a client," this would be a "disserv[ice to] the very goal of vigorous and effective advocacy." *See Jones v. Barnes*, 463 U.S. at 754. "Nothing in the Constitution or [the Court's] interpretation of that document requires such a standard." *Id.* (footnote omitted). To meet the second *Strickland* prong of prejudice, a petitioner must show that "there was a reasonable probability that [his] claim would have been succe[ssful]." *See Claudio v. Scully*, 982 F.2d at 805; *see also Mayo v. Henderson*, 13 F.3d at 534. Therefore, it was due to appellate counsel's failure that such claim was not brought or was not successful. *See Mayo v. Henderson*, 13 F.3d at 534; *see also Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) ("[T]he 'prejudice component of the *Strickland* test . . . focuses on the question whether counsel's deficient performance render[ed] the result of . . . the proceeding fundamentally unfair." (citing *Strickland v. Washington*, 466 U.S. at 687; *Kimmelman v. Morrison*, 477 U.S. 365, 393 (1986) (Powell, J., concurring))).

Petitioner claims that his appellate counsel was also ineffective, arguing that the appellate counsel failed to raise "the issue of Petitioner being denied his right to effective assistance of trial counsel" during Petitioner's

direct appeal. *See* Pet. Mem. at pp. 52, 56. Reiterating the *Strickland* standard for appellate counsel, it is not enough to argue that appellate counsel omitted some arguments, instead it must be shown that such omission was of strong arguments to instead argue weaker ones. *See Clark v. Stinson*, 214 F.3d 315, 322 (2d Cir. 2000). Petitioner's claim lacks any showing that the issues appellate counsel made were substantially weaker than that of ineffective assistance of trial counsel; without such evidence Petitioner's claim towards his appellate counsel must fail. *Cf.* Pet. Mem. at pp. 52–56 (no such argument contained within).

Further, appellate counsel argued that the county court erred in its denial to suppress evidence, in the legal sufficiency of the evidence, the jury charge, and the sentence, among other issues. *See* [redacted]. The omission of a singular issue, an issue which this Court finds flawed, is not enough to find that Petitioner's appellate counsel rendered ineffective assistance. Assuming, *arguendo*, that such omission constituted ineffectiveness, no evidence is offered that such issue would have demonstrated "reasonable probability" that this claim would have been successful, nor effect the outcome of Petitioner's appeal; therefore, such claim also fails. *See* Pet. Mem. at p. 56; *see also Claudio v. Scully*, 982 F.2d at 805.

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Attached below is an excerpt of a 40-page note discussing the Supreme Court's 2018 *Wayfair* decision. I am the exclusive author and editor of this note. I chose the section which discusses the dormant Commerce Clause and the Due Process Clause.

A brief introduction of the topic and prior discussion follows:

> *This note weighs the Supreme Court's historical holdings regarding the States' application of sales and use taxes against the* Wayfair *decision. Further, it considers the reach and effect of changing jurisprudence between the Commerce Clause and the Due Process Clause. Finally, it weighs the argument that certain States' hasty adoption of Economic Nexus Threshold laws, as the result of* Wayfair*, violates these constitutional clauses and therefore can be invalidated by the Supreme Court as unconstitutional. This shift has gone too far and is in need of correction. In analyzing this, this note lays out a framework for states to follow to avoid impinging such rights, along with what action, besides legislative upheaval by each state, can remedy this issue.*

Section I was bifurcated, and first laid out a brief introduction into States' sales and use taxes, then discussed the two critical constitutional provisions which are applicable to this topic.

Section II focused on the Supreme Court's jurisprudence and holdings on this topic, prior to its *Wayfair* decision. This section also included the Court's written understanding of the constitutional protections when applied to these past cases, along with the responses that some States drafted in their attempt to work around the Court's physical presence requirement.

Section III analyzed the Wayfair decision, the facts leading up to the Court's holding, and the new rule pronounced by the Court.

Section IV, which follows, then gives more depth to the preliminary ideations put forth in Section I, of the dormant Commerce Clause and the Due Process Clause, targeting these constitutional considerations for this topic.

IV. Commerce & Due Process – The Protections Explained:

The Constitutional elements that restrict and control the jurisprudential area of this topic were discussed in brevity above,[145] but a deeper discussion of each follows below. As articulated in the *Wayfair* decision, "[w]hen considering whether a State may levy a tax, Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels."[146]

1. Commerce Clause:

To begin a deeper dive into the Constitutional underpinnings of the Court's decision in *Wayfair*, the Commerce Clause is the right place to start.[147] To reiterate, "Congress is authorized by Article I, Section 8, Clause 3, of the Constitution '[t]o regulate Commerce with foreign Nations, and among the several States.'"[148] Yet, this is limited to only particular "powers,"[149] not including how the states might act without congressional action.[150] From this absence, the Supreme Court has created a doctrine used to "prohibit state regulatory action even when Congress has not acted."[151] The Court has used the "dormant," or "negative," Commerce Clause "to advance 'the solidarity and prosperity of this Nation' by striking down state-imposed restraints on interstate commerce without waiting for a sluggish Congress to invalidate them."[152]

In the early days of the dormant Commerce Clause, state regulations would only be validated if their impact on interstate commerce was merely indirect, incidental, or remote.[153] This lasted until a new

[145] *See* discussion *supra* Section I(2).
[146] *Wayfair*, 138 S. Ct. at 2093.
[147] *See* discussion *supra* Section I(2).
[148] BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE, ch. 1, p. 3 (1999).
[149] *See* Dep't of Rev. v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734, 749 (1978) (this language "merely grants specific powers to Congress.").
[150] *See* H.P Hood & Sons v. DuMond, 336 U.S. 525, 534–35 (1949) ("[W]hat states may or may not do in the absence of [any] congressional action" is not specified).
[151] BITTKER, *supra* note 148, at ch. 6, p. 3.
[152] *Id.* (quoting *H.P Hood & Sons*, 336 U.S. at 535); *see also* Adam B. Thimmesch, *A Unifying Approach to Nexus Under the Dormant Commerce Clause*, 116 Mich. L. Rev. Online 101, 104 (2018) (explaining the early history of the dormant Commerce Clause, "born from the experience of early America under the Articles of Confederation.").
[153] *See* BITTKER, *supra* note 148, at ch. 6, pp. 23-24; *see generally* Smith v. Alabama, 124 U.S. 465 (1888). Although the original version of the dormant Commerce Clause was created in 1851 by Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), wherein the Court made determinations between "national" and "local" subject areas. *Id.* at 319.

ideology was adopted, which, although intertwined, marks a different importance in validation: whether the state regulation "is outweighed by the interest of the nation."[154]

In non-tax cases, this national interest viewpoint still rules, for the most part.[155] The "Court looks for state regulations that are discriminatory or protectionist, whether on their face or in purpose or effect. Regulations that fall in those categories are virtually per se illegal."[156] Regulations, which do not fall into these categories, are instead tested through the Court's balance of certain interests.[157] Such a balancing test is generally derived from, and stated in, *Pike v. Bruce Church, Inc.*, where the Court ruled that a state statute, which has a "legitimate local public interest," and whose "effects on interstate commerce are only incidental," will be "upheld unless the burden imposed on such [interstate] commerce is clearly excessive in relation to the putative local benefits."[158] Such balancing is motivated by the Court's underlying goal in its use of the dormant Commerce Clause to promote and pursue "free access to every market in the Nation."[159]

In taxation cases, this balancing and concern is different.[160] Part of the difference is because "legal doctrine in the state and local tax area is shot through with uneasy juxtapositions and outright

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[154]Southern Pacific Co. v. Arizona, 325 U.S. 761, 783–84 (1945); *see also* BITTKER, *supra* note 148, at ch. 6, p. 29.
[155]*See* Thimmesch, *supra* note 152, at 104–05 ("In non[-]tax cases, the Court looks for state regulations that are discriminatory or protectionist, whether on their face or in purpose or effect.") (citing BITTKER, *supra* note 148, at ch. pp. 37 – 38).
[156]*Id.* Discriminatory regulation "by a state [is one] in favor of its own commercial actors, interests, or activities, to the detriment of interstate or out-of-state equivalents." Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 260 (2017) (citing Comptroller of Treasury v. Wynne, 575 U.S. 542, 548–49 (2015); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987)). Protectionism is similar, as efforts "to suppress or mitigate the consequences of competition between the states." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).
[157]*See* BITTKER, *supra* note 148, at ch. 6, p. 38; Thimmesch, *supra* note 152, at 105; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *CTS Corp.*, 481 U.S. at 88–89 (collecting cases).
[158]*Pike*, 397 U.S. at 142.
[159]*H.P Hood & Sons*, 336 U.S. at 539; *see also* BITTKER, *supra* note 148, at ch. 6, p. 35; Thimmesch, *supra* note 152, at 105. "[W]hether or not the concept of a market free of state-imposed economic protectionism is an anachronism when attributed to the Framers, it is by now deeply entrenched in the case law applying the dormant Commerce Clause doctrine." BITTKER, *supra* note 148, at ch. 6, 36 (explaining Justice Robert Jackson's common marketplace view of the national economy, with comparison to what the Framers may have meant when designing the Commerce Clause).
[160]*See* Thimmesch, *supra* note 152, at 104 ("[i]n the tax area, [the Court] now implements a four-part test that strikes down state laws only if they (1) apply to taxpayers without a substantial nexus with the state, (2) are discriminatory, (3) are not fairly apportioned, or (4) are not fairly related to the services provided by the state.") (citing *Complete Auto*, 430 U.S. at 279); BITTKER, *supra* note 148, at ch. 8, p. 3 ("[n]o area of state regulation is more routinely constrained by the dormant Commerce Clause than the taxation of enterprises that operate across state lines."); *see*

contradictions, . . . implicitly balancing aversion to discrimination against concern for state and local autonomy."[161] As such, concern for a national market is obfuscated in state taxation areas, since such an ideal would require some semblance of a nationally set standard.[162] Instead, the Court applies the dormant Commerce Clause in assessing state regulations of taxations through *Complete Auto*'s four-part test,[163] from which "the Commerce Clause requires a 'definite link' or 'minimum connection' between the taxing state and the taxable person or event."[164] With such a requirement in place, "states are free to tax as they see fit as long as their taxes are nondiscriminatory and fairly apportioned. The one exception of course is states cannot go 'too far' in *who* they impose those burdens on."[165]

Some posit that this nexus requirement has the same functionality as *Pike*'s balancing,[166] without the "difficulties of real balancing by giving conclusive weight to the perceived benefits of a bright-line safe harbor."[167] Perhaps some of the differences are because "[t]ax cases are, doctrinally speaking, a little different, and much more specific" and because "the analysis relies on peculiar heuristics like 'fair

also Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) ("the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value."); *Bellas Hess*, 386 U.S. at 760 ("The very purpose of the Commerce Clause was to ensure a national economy free from . . . unjustifiable local entanglements.").

[161]Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 942 (1992). "The Court must also respect states' retained autonomy under the 10th Amendment, which necessary[il]y requires the Court to sometimes subordinate" their goals. Thimmesch, *supra* note 152, at 105 (citation omitted).

[162]*See id.*; Shaviro, *supra*, note 161, at 910 ("measuring locational [tax] neutrality is not only abstract and counterfactual, but utterly unattainable other than by actually establishing a uniform national taxing system.").

[163]*See* discussion *supra* Section III(2).

[164]BITTKER, *supra* note 148, at ch. 8, p. 19 (quoting *Bellas Hess*, 386 U.S. at 756); *see id.* at ch. 8, p. 36 (in regard to such connectivity, stating that "[t]his point seems self-evident, but as a Due Process requirement, unrelated to the dormant Commerce Clause"); *see also* discussion *supra* Section III(2).

[165]Thimmesch, *supra* note 152, at 108 (citing Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625–29 (1981); John A. Swain, *State Income Tax Jurisdiction: A Jurisdictional and Policy Perspective*, 45 WM. & MARY L. REV. 319, 341 (2003)); *see also* BITTKER, *supra* note 148, at ch. 8, pp. 35–36.

[166]*See, e.g.*, Thimmesch, *supra* note 152, at 106–07 ("Discussion about the physical-presence rule have long been about the tradeoffs between state revenue and the compliance costs associated with tax-collection obligations. What is important about putting nexus squarely in this frame is that it reveals the nexus requirement is nothing more than blunt-force *Pike* balancing.") (citing John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 355 (2003)); *see also supra* notes 151–59 and accompanying text.

[167]*Id.* at 108 (citing *Quill*, 504 U.S. at 315). "This framing helps the nexus requirement stand out as serving the same role as *Pike*'s balancing test. It operates differently only because the *Quill* Court avoided actually balancing by adopting a uniform, national nexus rule." *Id.*

apportionment' and 'substantial nexus,' rather than more porous tests ('legitimate,' 'clearly excessive,' and so on) that characterize the non-tax cases."[168]

While the Court's application of the dormant Commerce Clause has often been convoluted in tax cases,[169] frequently due to a less-than-ideal distinction with the Due Process Clause,[170] the *Quill* Court "made it clear that the dormant Commerce Clause goes beyond what the minimum nexus of due process demands."[171] One such distinction, which bears weight to the jurisprudence of this topic, is the "congressional-consent exception" to dormant Commerce Clause, which "permits Congress to overturn ostensibly constitutional rulings without resort to the constitutional amendment process."[172] In other words, "[i]f Congress so provides, state laws that otherwise offend the dormant Commerce Clause are immune from challenge under it."[173] Following this principle, the *Quill* Court stated "Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes."[174]

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[168]Francis, *supra* note 156, at 291–92 (citing Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1099 (1986)).
[169]*See* FREDERICK H. COOKE, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, 249–50 (1908) ("there is a strong tendency to . . . unnecessarily inquire as to the application of the commerce clause [on taxes], a tendency that is, in our view, strongly to be deprecated, as tending to increase the already abundant confusion as to its proper scope.").
[170]*See* discussion *infra* Section IV(3); *see also supra* notes 124–25 and accompanying text.
[171]DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 326 (2004) (citing generally *Quill*, 504 U.S. 298) ("The issue in *Quill* was whether a state could require a mail-order business to collect and remit a use tax on items sold for delivery into the state.").
[172]*Id.* at 292–93; *see also* BITTKER, *supra* note 148, at ch. 8, p. 41–42 (discussing that the limits applied by the dormant Commerce Clause "can be lifted by congressional consent to state action that would otherwise violate the Commerce Clause; [and] conversely, the state's authority to tax interstate commerce in absence of congressional intervention can be restricted, or even eliminated, when Congress so chooses."); *see, e.g.*, *infra* note 173–74 and accompanying text.
[173]*Quill*, 504 U.S. at 318. While Coenen quotes *Cooley* as an example of the controversy this exception is laced with, where "the Court asserted that '[i[f the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot re-grant, or in any manner re-convey to the States that power.'" COENEN, *supra* note 171, at 293 (quoting *Cooley*, 53 U.S. at 318). Coenen also writes that "the Court declared that Congress could exercise its power to regulate interstate commerce, including by subjecting it to the limitations and disadvantages, 'in conjunction with coordinated action by the states.'" *Id.* (quoting Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946)).
[174]*Quill*, 504 U.S. at 318; *see also* COENEN, *supra* note 171, at 327. As we know, Congress has not acted, and the Court has now allowed State regulation to pass requiring such burden on companies without *Quill*'s antiquated physical presence test. *See* discussion *supra* Section III(2).

The dormant Commerce Clause nexus requirement also ties into the "risk of multiple taxation,"[175] a risk which the *Complete Auto* test attempted to mitigate with the requirement that the state tax be "fairly apportioned."[176] Indeed, the Court asserted that states may only tax "that aspect of the interstate commerce to which the State bears a special relation."[177] In taxation schemes other than sales and use, such as income tax, states have "adopted apportionment-based techniques in imposing income-based taxes on firms with unitary multistate operations."[178] While in such areas there has been litigation regarding the internal aspects of such apportionment schemes, as one firm argued that a "sales-only approach offended the dormant Commerce Clause goal of fostering 'tax neutral decisions' by rewarding firms that located their physical" presence "within, rather than outside, the taxing state."[179] To answer such issue, the Court "rejected this argument, emphasizing the difficulties of judicial micro-management of facially non-discriminatory apportionment methodologies."[180] That being said, the Court has created an approach to evaluate apportionment concerns: the internal consistency test.[181] This test is satisfied if "the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear."[182] The Court's "modern cases carry forward the traditional requirement of fair apportionment by requiring not only internal consistency but so called external consistency as well."[183] This external consistency test looks "to the economic justification

[175]*Quill*, 504 U.S. at 309.
[176]*Complete Auto*, 430 U.S. at 279; *see also* COENEN, *supra* note 171, at 328–29.
[177]Cent. Greyhound Lines v. Mealy, 334 U.S. 653, 661 (1948).
[178]COENEN, *supra* note 171, at 329.
[179]*Id.* at 330 (quoting Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 331 (1977)).
[180]*Id.* (citing Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278 (1978)).
[181]*See generally* Walter Hellerstein, *"Is Internal Consistency Foolish?": Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 1381 (1988); *see also* COENEN, *supra* note 171, at 330–31.
[182]Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995). Interestingly enough, Congress responded to the holding in *Jefferson Lines*, with the passage of the 49 U.S.C. § 14505 (2000), prohibiting a "State or political subdivision thereof" from "collect[ing] or levy[ing] a tax, fee, head charge, or other charge a passenger traveling in interstate commerce." *Id.*; *see generally* Jalbert Leasing, Inc. v. Mass. Port Auth., 449 F.3d 1, 3 (1st Cir. 2006); Tri-State Coach Lines, Inc. v. Metro. Pier & Exposition Auth., 732 N.E.2d 1137, 1146 (Ill. App. Ct. 1st Dist. 2000); Renzenberger, Inc. v. State Tax'n & Revenue Dep't, 409 P.3d 922, 929 (N.M. Ct. App. 2017).
[183]COENEN, *supra* note 171, at 333 (citing *Jefferson Lines*, 514 U.S. at 185).

for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State."[184]

Such evolution and strict tests have not been brought over from other state tax cases to sales taxes, even if the effect or factual scenario has major similarities, as evidenced by comparing *Jefferson Lines* with *Central Greyhound Lines*.[185] Doing just that, the Court declared that "economic equivalence alone has . . . not been (and should not be) the touchstone of Commerce Clause jurisprudence."[186] Through such discussions, and holdings, it is clear that the Court has a "continuing hesitation to carry over to the sales tax context a jurisprudence of fair apportionment developed to deal with taxes based on income and property value."[187]

2. Due Process Clause:

The *Wayfair* Court wrote that it "is settled law that a business need not have a physical presence in a state to satisfy the demands of due process;"[188] but what exactly are the demands of due process? What are the differences in substantive and procedural due process, and how does a state satisfy such demands?[189]

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[184]*Jefferson Lines*, 514 U.S. at 185 (citing Goldberg v. Sweet, 488 U.S. 252, 262 (1989); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 170 (1983)). Although, the Court has "deemed any requirement of fair apportionment essentially inapplicable to the 'conventional sales tax' imposed on a local transfer of goods notwithstanding arguments that the transferred product has close connections with other states." COENEN, *supra* note 171, at 334 (citing *Jefferson Lines*, 514 U.S. at 188; State Tax Comm'n v. Pacific State Cast Iron Pipe Co., 372 U.S. 605, 606 (1963); Browning v. Waycross, 233 U.S. 16, 23 (1914); Walter Hellerstein, Michael J. McIntyre, & Richard D. Pomp, *Commerce Clause Restrains on State Taxation After* Jefferson Lines, 51 TAX L. REV. 47, 86 (1995)). "Even so, internally consistent taxes occasionally run afoul of the external-consistency requirement." *Id.* (giving an example and further explaining the intricacies of the two requirements); *see also* BITTKER, *supra* note 148, at ch. 8, p. 37–40 (explaining the history behind the consistency tests and the way in which such tests were quickly "converted into a more comprehensive test of constitutionality.").

[185]*See* COENEN, *supra* note 171, at 337. "To the dissenters [in *Jefferson Lines*], the difference between the sales tax and the gross receipts tax was purely 'formal' because both exactions 'as a practical matter' required sellers to remit unapportioned tax payments calculated by focusing on exactly the same tax base." *Id.* (quoting *Jefferson Lines*, 514 U.S. at 204 (Breyer, J., joined by O'Conner, J., dissenting).

[186]*Jefferson Lines*, 514 U.S. at 196 n.7.

[187]COENEN, *supra* note 171, at 338.

[188]*Wayfair*, 138 S. Ct. at 2093 (citing *Burger King*, 471 U.S. at 476). The Court wrote that "[a]lthough physical presence 'frequently will enhance' a business' connection with a State, 'it is an escapable fact of modern commercial life that a substantial amount of business is transacted . . . [with] no need for physical presence within a state in which business is conducted.'" *Id.* (quoting *Quill*, 504 U.S. at 308).

[189]*See supra* notes 14–20 and accompanying text; *see also infra* notes 198–208 and accompanying text.

Both the Fifth and the Fourteenth Amendments to the Constitution protect citizens from any government action which deprive any person of life, liberty, or property without "due process of law."[190] These Due Process Clauses give substantive and procedural protections to the citizens; the difference, as discussed above,[191] hinges on either the interest intended to be regulated or the method in which such regulation is attempting to be made.[192]

Substantive Due Process, in the commercial realm, has fallen by the wayside since 1937, as "not one federal, state, or local economic regulation has been invalidated" on such grounds.[193] The paramount concern in such field is "whether there should be constitutional protection of economic rights, such as freedom of contract and a right to practice a trade or profession."[194] The effect of such judicial decision has been to make unavailable economic substantive due process to "challenge government economic and social welfare laws and regulations."[195] Instead, remonstrances to such laws come under two other constitutional provisions: the Contracts Clause and the Takings Clause.[196]

A central idea, therefore, in the modern constitutional vision, has been for courts to "focus on procedural rather than substantive protection for economic rights."[197] Procedural Due Process "asks whether the government has an adequate reason, . . . whether there is sufficient justification for the

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[190] *See* U.S. CONST. amends. V, XIV. In explaining the differences, and the history behind the adoption of the Fourteenth Amendment, one scholar writes that the "failing to specify particular procedural safeguards in the Fourteenth Amendment itself – such as the Fifth Amendment presentment or indictment requirement – the framers may have intended to leave the states 'free to make their own procedural rules with the sole obligation that tey had to be the same for every person.'" RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 9 (2004) (quoting HERMINE HERTA MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT 126–27 (1977)).

[191] *See supra* notes 14–20 and accompanying text.

[192] *See* WASSERMAN, *supra* note 190, at 1; *see also* Chemerinsky, *supra* note 15; McGreal, *supra* note 10, at 1228–29.

[193] *See* Chemerinsky, *supra* note 15, at 1504. The exception to this would be recent cases where the Court has used the Due Process Clause to "invalidat[e] large punitive damage awards" by "declar[ing] unconstitutional a government action, here by state courts, as not sufficiently justified." CHEMERINSKY, *supra* note 10, at 606; *see, e.g.*, BMW of N. Am. V. Gore, 517 U.S. 559 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Philip Morris USA Inc. v. Williams, 556 U.S. 178 (2009).

[194] CHEMERINSKY, *supra* note 10, at 618.

[195] *Id.*

[196] *See* U.S. CONST. art 1, § 10; *id.* amend. V. For a further discussion of those protections and the Court's jurisprudence thereof, see CHEMERINSKY, *supra* note 10, at 618–31, 631–82.

[197] *See* McCluskey, *Constitutional*, *supra* note 129, at 286.

government's action."[198] The Supreme Court stated that "there can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[199] Further, "the two central concerns of procedural due process [are] the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals."[200]

As prefaced by the *Quill* decision, the Court's Due Process jurisprudence has "abandoned more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum" provide for requisite notice.[201] Following such, a "forum State [permissibly uses] its powers under the Due Process Clause if it asserts . . . jurisdiction . . . over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[202]

Thus, in taxation cases, for a state to properly impose a tax on an out-of-state business, while conforming with the Due Process Clause, there must be some minimum contacts, requiring the company's activities in the state to be "systematic" and "continuous," not merely "irregular" or "casual."[203] Regarding "interstate contractual obligations," for example, the Court has "emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities."[204]

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[198]CHEMERINSKY, *supra* note 10, at 1129.
[199]Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).
[200]Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (citing Carey v. Piphus, 435 U.S. 247, 259–62, 266–67 (1978)).
[201]*Quill*, 504 U.S. at 307.
[202]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) (citing Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961)).
[203]Int'l Shoe Co. v. Washington, 326 U.S. 310, 317–20 (1945); *see also* ETHAN D. MILLAR, OVERVIEW OF STATE AND LOCAL TAXATION 6, *in* STRATEGIES FOR ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS (PLI, Oct. 1, 2009)
[204]*Burger King*, 417 U.S. at 473 (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950); citing McGee v. Int'l Life Ins. Co., 255 U.S. 220, 222–23 (1957)).

Justice Scalia's *Quill* concurrence answers the burgeoning question as to the similarities between tax jurisdiction and other state jurisdictions, as he writes that *Quill*'s "abandonment of *Bellas Hess*'[s] due process holding is compelled by reasoning 'comparable' to that contained in [the Court's] post-1967 cases dealing with state jurisdiction to adjudicate."[205] Therefore, given similar situations, a taxpayer "clearly has 'fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign.'"[206]

Further, with respect to the topic at hand, the Court has long upheld that a "state is free to pursue its own fiscal policies, unembarrassed by the Constitution, *if* by the practical operation of [the] tax the state has exerted its power *in relation to opportunities which it has given, to protection which it has afforded,* [or] *to benefits which it has conferred*."[207] Notably, the same Court wrote that the "fact that a tax is contingent upon events brought to pass [beyond the] state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."[208]

3. Differing Restraints & Requirements Applied:

While the respective clauses discussed above vary in their applications, both between each other, and often times within themselves,[209] the Court is well equipped to make such distinctions.[210] In fact, as

[205]*Quill*, 504 U.S. at 319 (Scalia, J., concurring in part and concurring in judgment). Although Justice Scalia does write that he does "not understand this to mean that the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are necessarily identical." *Id.* at 319–20 (*comparing* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 *with* Am. Oil Co. v. Neill, 380 U.S. 451).
[206]*Id.* at 308 (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).
[207]Wisconsin v. J.C. Penny Co., 311 U.S. 435, 444 (1940) (emphasis added). "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax." *Id.*; *see also* MILLAR, *supra* note 203 ("jurisdiction will generally be found where it is reasonable to conclude that the company would be 'on notice' that it may be subject to tax in that state, based on the company's activities or property within that state.").
[208]*J.C. Penny*, 311 U.S. at 445 (citing Continental Assurance Co. v. Tennessee, 311 U.S. 5 (1940); Equitable Life Soc'y v. Pennsylvania, 238 U.S. 143 (1915); Maxwell v. Bugbee, 250 U.S. 525 (1919); Compania Gen. de Tabacos De Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 98 (1927), New York *ex rel*. Cohen v. Graves, 300 U.S. 308 (1937); Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412 (1937); Atl. Refin. Co. v. Virginia, 302 U.S. 22 (1937); Curry v. McCanless, 307 U.S. 357 (1939)).
[209]*See* discussion *supra* Section IV(1) & (2).
[210]*See Wayfair*, 138 S. Ct. at 2092; *see also Quill*, 504 U.S. at 305; ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 350 n.14 (1982) (O'Connor, J., dissenting) ("Our cases establish that analysis of the validity of state taxation under the Commerce Clause is similar to analysis under the Due Process Clause."); *but see* Charles Rothfeld, Quill: *Confusing the Commerce Clause*, 56 TAX NOTES 487, 492 (1992) ("[T]he *Quill* Court's rooting about for a Commerce Clause nexus rationale has placed on the books a confusing and potentially disruptive analysis that is likely to confuse Commerce Clause doctrine for some time to come.").

evidenced in the above sections,[211] such known separation between the clause's powers was the reason behind the *Quill* Court's careful maneuvering,[212] allowing for Congress to pay heed to their ruling and enforce its own legislation.[213]

When evaluating state legislation, under the clauses relevant to this topic, the "Court's 'threshold' for invalidating [such] legislation should be considerably higher under the Due Process Clause than under the Commerce Clause."[214] While muddled and often both evasive and overly broad, at the same time;[215] the current requirements that must be met if a State's taxation is to comply with the Due Process Clause and the Commerce Clause can be found, respectively, in *Burger King* and its progeny,[216] and in *Complete Auto*.[217]

[211]*See supra* notes 76–78, 115–16 and accompanying text.
[212]*See Quill*, 504 U.S. at 305. Congress can "authorize state action that burden interstate commerce," it cannot "authorize violations of the Due Process Clause." *Id.* (citing *Int'l Shoe*, 326 U.S. at 315). "[I]t has long been established that Congress generally has the power to 'overrule' a decision of this Court invalidating state legislation on Commerce Clause grounds," contrary to that, though "Congress generally cannot waive a ruling of this Court decided under the Due Process Clause." *ASARCO*, 458 U.S. at 350 n.14 (O'Connor, J., dissenting) (citing Leisy v. Harden, 135 U.S. 100 (1980); *In re* Rahrer, 140 U.S. 545 (1891)).
[213]*See* HELLERSTEIN ET AL., *supra* note 1, at 35 (The *Quill* Court "cleared the way for Congress to enact a different rule if it chose to do so. For better or worse, however, Congress has not taken the opportunity to enact legislation on this issue.").
[214]*ASARCO*, 458 U.S. at 350 n.14.
[215]*See, e.g.*, Rothfeld, *supra* note 210 ("[D]uplicative taxation itself is a questionable justification for the nexus rule that is incorporated in the first prong of the *Complete Auto* test, since duplicative levies fail the second prong of *Complete* auto without regard to nexus."). Further, although overruled, *Quill*'s Commerce Clause "analysis appears to be premised on assumptions that are unfounded – and [is] riddled with internal inconsistences," indicative that such confusion may not be as far away as it seems. *Id.* at 488.
[216]*See Burger King*, 471 U.S. at 471–72; *Int'l Shoe*, 326 U.S. at 319; *World-Wide Volkswagen*, 444 U.S. at 298; *see also Wayfair*, 138 S. Ct. at 2093; *Quill*, 504 U.S. at 308. "It is settled law that a business need not have a physical presence in a State to satisfy the demands of due process." *Wayfair*, 138 S. Ct. at 2093 (citing *Burger King*, 471 U.S. at 476).
[217]*See id.* at 2099 ("In the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with substantial nexus with the taxing State.") (citing *Complete Auto*, 430 U.S. at 279); *see also Complete Auto*, 430 U.S. at 279 ("These decisions have . . . sustained a tax against Commerce Clause challenge[s] when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.") (footnote omitted); *see generally, e.g.*, Memphis Nat. Gas Co. v. Stone, 335 U.S. 80 (1948); *Nw. States*, 358 U.S. at 450 (1959); *J.C. Penney*, 311 U.S. at 444 (1940).

V. State Threshold Laws:

Post-*Wayfair*, following South Dakota's lead, States quickly adopted similar statutes, "43 of 45 states with statewide sales taxes have adopted collection and remittance obligations for remote sellers."[218] The difficulty is that States first had make "policy decision[s]" to impose regulation "for that state, in terms of revenue, economics, and fairness."[219] Therefore, these threshold regulations should be designed through in-depth studies of the individual needs of each State, while also working collectively to develop some level of coordination between the States.[220]

[218]Azim, *supra* note 30, at 135 (citing Ryan Prete, *State Group Advises Lengthy Pause Before Collecting Online Sales Tax*, BLOOMBERG LAW (July 2, 2018) https://news.bloombergtax.com/daily-tax-report-state/state-group-advises-lengthy-pause-before-collecting-online-sales-tax [https://perma.cc/2DQB-E5RP]); *see also* Henry Ordower, *Avoiding Federal and State Constitutional Limitations in Taxation*, TAX NOTES FED., Aug. 2020, at 1447, 1451 (The States enforced "[e]conomic nexus . . . for collection obligation[s] considering the volume of commerce conducted . . . and [had been] avoided even in the presence of substantial activity over the internet into the taxing state" by companies); S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016) (codified at S.D. CODIFIED LAWS § 10-64 (2017)). "[S]tates got the hint and adopted economic presence thresholds in the wake of *Wayfair*." Andrea Muse, Wayfair *Blurred Line Between Due Process and Commerce Clause, Panel Says*, TAX NOTES, Dec. 2021, at 2.
[219]Azim, *supra* note 30, at 130–31.
[220]*See id.* at 133–34 (All "states and their revenue departments [should] conduct new studies and consider new circumstances and data, . . . studying the costs of compliance for different sizes of sellers in order to design the most appropriate tax threshold while alleviating burdens on smaller retailers. Finally, and most importantly, states should work together to develop a multistate layer of cooperation and consideration.").

Applicant Details

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Date of BA/BS	**May 2020**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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August 1, 2023

The Honorable James O. Browning
U.S. District Court for the District of New Mexico
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am a rising third-year law student at the University of Chicago Law School and I am applying for a clerkship in your chambers for the 2025 term. I am certain a clerkship in your chambers would provide both practical experience and insight into judicial analysis that will be formative to a career in civil litigation. As I intend to practice law in the Southwest, I would also welcome the opportunity to clerk in New Mexico.

As an intern for a U.S. Attorney's Office and as a member of the Civil Rights and Police Accountability Project within the Mandel Legal Aid Clinic, I have gained strong research and writing skills on a wide range of legal issues. For those experiences, I have written memoranda on issues such as potential civil rights investigations, the impact of since-decriminalized drug convictions on sentencing, and the physical boundaries of a permissible search of a location described in a warrant. I have also contributed to research and reports on police use-of-force training and police presence in trauma centers as a healthcare privacy issue. These experiences have strengthened my ability to write nuanced legal and factual analysis clearly, succinctly, and under tight deadlines. I have also developed my statutory interpretation abilities as a member of *The University of Chicago Law Review*, for which I wrote a Comment that required close textual analysis of a federal statute. This summer, I continued to gain practical writing experience as a summer associate at the litigation firm Quinn Emanuel Urquhart & Sullivan, writing a memorandum on navigating data privacy issues, drafting a motion in a film industry contract dispute, and performing legal research for a variety of other cases. I am acquiring additional experience at the California Women's Law Center, where I am currently working on legal research pertaining to domestic violence shelters.

My resume, transcripts, and writing samples are attached for your review. Please let me know if there is any other information I can provide, and thank you so much for your consideration.

Sincerely,

Natalie Cohn-Aronoff

Natalie Cohn-Aronoff

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EDUCATION

THE UNIVERSITY OF CHICAGO LAW SCHOOL, Chicago, IL
J.D. candidate, June 2024
Honors: Dean's Award, Constitutional Law III: Equal Protection and Substantive Due Process (highest grade in section)
Activities: The University of Chicago Law Review, Online Editor
If/When/How: Lawyering for Reproductive Justice, Vice President
Jewish Law Students Association, Vice President
Entertainment and Sports Law Society, Vice President of Entertainment
Law School Musical, Senior Writer
American Constitution Society, Member

UNIVERSITY OF SOUTHERN CALIFORNIA, Los Angeles, CA
B.F.A., *summa cum laude*, Writing for Screen and Television, May 2020
Minor in Law and Public Policy
Honors: Renaissance Scholar (distinction for academic achievement in disparate fields of study)
Phi Kappa Phi
Thematic Option Honors College
Academic Achievement Awards (merit scholarships)
Study Abroad: University of Burgundy, Dijon, France, Summer 2018
Activities: Women of Cinematic Arts, Co-President (currently sit on the Membership Committee of the alumni board)
Women's Ice Hockey, Player
Trojan Debate Squad, Member

EXPERIENCE

CALIFORNIA WOMEN'S LAW CENTER, El Segundo, CA — July 2023–Present
Summer Legal Intern

QUINN EMANUEL URQUHART & SULLIVAN, Los Angeles, CA — May 2023–July 2023
Summer Associate

- Drafted motion in limine and client memos on navigating data privacy laws and developments in ESG regulation.
- Wrote memo on First Amendment litigation brought by technology platforms and users against recent state laws.
- Conducted legal research and wrote informal memos on a range of substantive areas of law, including trade secrets, defamation and anti-SLAPP laws, and Covid-related tuition refund class actions, as well as various civil procedure issues.
- Participated in a mock trial as defense counsel.

APPLE TV+, Los Angeles, CA (remote) — Mar. 2023–Present
Reader

- Summarize, analyze, and offer constructive comments on books and screenplays for potential production.

CIVIL RIGHTS AND POLICE ACCOUNTABILITY PROJECT, Chicago, IL — Sept. 2022–May 2023
Clinical Student

- Contributed to a report on Chicago Police Department training on use of force and presented findings.
- Analyzed reports and researched several areas of law in connection with a federal consent decree.
- Conducted research, including interviews, on police presence in trauma centers as part of a medical-legal partnership.

UNITED STATES ATTORNEY'S OFFICE, Newark, NJ — May 2022–July 2022
Summer Legal Intern

- Researched legal avenues to pursue a potential civil rights investigation and discussed findings in a memorandum.
- Conducted legal research on a criminal procedure issue and wrote a response to a motion to suppress evidence.
- Assisted AUSAs with trial preparation for a variety of cases and prepared factual basis questions for a guilty plea.
- Underwent skill development trainings, including in legal writing and oral advocacy, attended trials and meetings alongside AUSAs, and participated in a mock trial as defense counsel.

SUGAR23, Los Angeles, CA (remote) — May 2020–Mar. 2023
Reader

- Summarized, analyzed, and offered constructive comments on books and screenplays for potential production or representation.

MOSAIC MEDIA GROUP, Beverly Hills, CA — Jan. 2020–May 2020
Management Intern

- Covered manager desks and front desk reception: rolled calls, managed emails and guests, and tracked casting updates.
- Read, summarized, and analyzed teleplays and submitted clients for roles.

SKILLS AND INTERESTS

Enjoy comedy writing, ice hockey, podcasts, indie rock music, and Old Hollywood movies.

LAW SCHOOL TRANSCRIPT

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Enclosed, please find a current version of my transcript, as well as a key to the University of Chicago's grading system.

At the University of Chicago Law School, only grades for classes with final exams are released at the end of the quarter. Grades for clinics are assigned at the conclusion of a student's participation in the clinic.

Classes for which grades are based upon a final paper also run on a different schedule. Final papers are typically due at the end of the subsequent quarter, and grades are released sometime after that. Advanced First Amendment Law and Constitutional Law V: Freedom of Religion are classes with final papers.

I am happy to provide an updated transcript as soon as one becomes available.

THE UNIVERSITY OF CHICAGO

Name: Natalie Cohn-Aronoff
Student ID: 12116825

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

University of Southern California
Los Angeles, California
Bachelor of Fine Arts 2020

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	180
LAWS	30211	Civil Procedure Emily Buss	4	4	177
LAWS	30611	Torts Adam Chilton	4	4	181
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Jonathan Masur	4	4	179
LAWS	30411	Property Aziz Huq	4	4	179
LAWS	30511	Contracts Douglas Baird	4	4	177
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Alison Gocke	2	2	178
LAWS	30713	Transactional Lawyering Joan Neal	3	3	177
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	184
LAWS	43273	Emotions, Reason, and Law Martha C Nussbaum	3	3	176
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182

Honors/Awards
The Dean's Award, for best exam in a section of Constitutional Law III by a first-year student

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence Geoffrey Stone	3	3	179
LAWS	45801	Copyright Randal Picker	3	3	178
LAWS	53263	Art Law William M Landes Anthony Hirschel	3	3	181
LAWS	90913	Civil Rights Clinic: Police Accountability Craig Futterman	1	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	180
LAWS	42801	Antitrust Law Randal Picker	3	3	181
LAWS	47201	Criminal Procedure I: The Investigative Process Sharon Fairley	3	3	178
LAWS	53131	Reproductive Health and Justice Emily Werth	3	3	181
LAWS	90913	Civil Rights Clinic: Police Accountability Craig Futterman	1	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Date Issued: 07/19/2023

THE UNIVERSITY OF CHICAGO

Name: Natalie Cohn-Aronoff
Student ID: 12116825

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	40501	Constitutional Law V: Freedom of Religion Mary Anne Case	3	0	
LAWS	43253	Regulation of Banks and Financial Institutions Adriana Robertson	3	3	177
LAWS	47101	Constitutional Law VII: Parent, Child, and State Emily Buss	3	3	180
LAWS	53469	Advanced First Amendment Law Genevieve Lakier	3	0	
LAWS	90913	Civil Rights Clinic: Police Accountability Craig Futterman	1	0	
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

Summer 2023

Honors/Awards
The University of Chicago Law Review, Online Editor 2023-24

End of University of Chicago Law School

Date Issued: 07/19/2023


THE UNIVERSITY OF
CHICAGO

On-line Academic Student Information System

OASIS Completed course summary

ID#: 8899222073

askUSC Knowledge Base Start Here

Last Name	First Name
Cohn-Aronoff	Natalie

Summary of Completed Courses

Current Degree Objective

	Degree Name	Degree Title
MAJOR	Bachelor of Fine Arts	Writing for Screen and Television
MINOR	Law and Public Policy	

Cumulative GPA through 20201

	Uatt	Uern	Uavl	Gpts	GPAU	GPA
UGrad	161.0	161.0	161.0	548.00	140.0	3.91
Grad	0.0	0.0	0.0	0.00	0.0	0.00
Law	0.0	0.0	0.0	0.00	0.0	0.00
Other	0.0	0.0	0.0	0.00	0.0	0.00

Fall Term 2016

Course	Units Earned	Grade	Course Description
CORE-111	4.0	A	Writing Seminar I: Thematic Option Honors Program
CORE-102gp	4.0	A	Culture and Values: Thematic Option Honors Program
MPVA-141	2.0	A	Class Voice
CTWR-100g	4.0	A	Story: Character, Conflict, and Catharsis
CTPR-409	2.0	A	Practicum in Television Production
CNTV-101	2.0	CR	Reality Starts Here

Spring Term 2017

Course	Units Earned	Grade	Course Description
FREN-150	4.0	A-	French II
CTWR-321	2.0	A	Introduction to Hour-Long Television Writing
CTWR-250	2.0	A	Breaking the Story
CTCS-201	4.0	A	History of the International Cinema II
CTCS-190g	4.0	A-	Introduction to Cinema
CORE-112	4.0	A	Writing Seminar II: Thematic Option Honors Program

Fall Term 2017

Course	Units Earned	Grade	Course Description
THTR-101	4.0	A	Introduction to Acting
ECON-203g	4.0	A-	Principles of Microeconomics
CTWR-416	2.0	A	Motion Picture Script Analysis
CTWR-206A	4.0	A	Writing the Screenplay
CTPR-290	6.0	B+	Cinematic Communication

Spring Term 2018

Course	Units Earned	Grade	Course Description
CORE-101g	4.0	A-	Symbols and Conceptual Systems: Thematic Option Honors Progr
THTR-252B	2.0	A-	Intermediate Acting I
FREN-220	4.0	A-	French III
CTWR-434	2.0	A	Writing the Half-Hour Comedy Series
CTWR-431	2.0	P	Screenwriters and Their Work
CTWR-411	2.0	A	Television Script Analysis

CTWR-206B	4.0	A	Writing the Screenplay

Summer Term 2018

Course	Units Earned	Grade	Course Description
FREN-250	4.0	P	French IV

Fall Term 2018

Course	Units Earned	Grade	Course Description
CORE-103g	4.0	A-	The Process of Change in Science: Thematic Option Honors Pro
CTWR-305	4.0	A	Advanced Screenwriting: The Relationship Screenplay
SOCI-150mg	4.0	A	Social Problems
PPD-225	4.0	A	Public Policy and Management
CTWR-439	4.0	A	Writing the Original Dramatic Series Pilot

Spring Term 2019

Course	Units Earned	Grade	Course Description
CORE-104gw	4.0	A	Change and the Future: Thematic Option Honors Program
CTCS-464	4.0	A	Film and/or Television Genres
CTWR-453	4.0	A	Advanced Feature Rewriting
GEOL-241Lg	4.0	P	Energy Systems
PPD-314	4.0	A	Public Policy and Law

Fall Term 2019

Course	Units Earned	Grade	Course Description
CTWR-420A	4.0	A	Senior Thesis in Half-Hour Television Comedy
THTR-474	2.0	A	Introduction to Stand Up Comedy
PPD-342	4.0	A	Crime and Public Policy
PPD-315	4.0	A	Analytic Foundations for Public Policy
CTWR-439	4.0	A	Writing the Original Dramatic Series Pilot

Spring Term 2020

Course	Units Earned	Grade	Course Description
CTWR-555	2.0	A	Pitching for Film and Television
CNTV-495	1.0	CR	Internship in Cinematic Arts
CTWR-459A	2.0	A	Entertainment Industry Seminar
CTWR-420B	4.0	A	Senior Thesis in Half-Hour Television Comedy
POSC-340	4.0	P	Constitutional Law
PORT-175	4.0	P	Accelerated Portuguese I
CTWR-468	4.0	A	Screenwriting in Collaboration

Professor Aziz Huq
Frank and Bernice J. Greenberg Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
huq@uchicago.edu | 773-702-9566

August 02, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I write to recommend Natalie Cohn-Aronoff (University of Chicago Class of 2024), as a law clerk in your chambers. In the academic year 2021-22, I taught Natalie in two 1L courses —Property and Constitutional Law (Equality and Due Process). Natalie did exceedingly well in the latter constitutional law class, and achieved a very commendable performance in the first, common-law class. I walked away from my interactions during class and from my reading of Natalie's exams with a very positive view of her lawyerly intellect. The balance of her transcript to date confirms my positive impressions of Natalie's intellectual skills: It is consistently strong. And it is no surprise to me that she was selected for the prestigious University of Chicago Law Review. In summary, my interactions with her over the course of the academic year suggest to me that she will be a polished, professional, and highly effective (at an interpersonal level) clerk in chambers. Accordingly, I am very pleased to offer a very enthusiastic recommendation on her behalf.

Let me begin with academics: Natalie is a strong student who has consistently secured very good grades, ranging from As to high Bs, across a diverse pool of demanding courses. In my constitutional law class—where the grade was based exclusively on a take-home exam—she wrote an exceptional set of answers that carefully and comprehensively addressed all of the issues presented by a fact pattern (a prerequisite to scoring well). Indeed, she secured (by a clear margin) the best grade in the class. I tend to write issue-intensive, complex hypotheticals that must be grasped and navigated in relatively narrow time frames. In Constitutional Law III, Natalie's exam was a masterwork of careful and lucid reasoning. She was able to aggregate information within the prompt, parse the nuance of legal questions (sorting the wheat of hard problems from the chaff of irrelevant detail), and then provide pellucid and fair-minded consideration of both sides of the argument. The exam, notwithstanding the pressure-cooker conditions of its production, was also an impressive feat of writing. I enjoyed reading the exam—which, in context, is quite the rare treat. Natalie's other exam, which was in my Property class, was not quite as strong. But if it fell a bit short of her magnificent Constitutional Law III performance, this should not be taken to suggest that it was an embarrassment. To the contrary, looking back at that exam, I think it was an entirely creditable effort.

I can support my very positive view of Natalie's intellectual and lawyering skills with other sources of information. First, I had several conversations with Natalie, including during a couple of group lunches with students, in which she impressed me with her intellectual range and her knowledge of the world. She has a wide-ranging mind, and continues to pay attention to—and engage with—the world. Second, the balance of her transcript confirms my impressions of her skill and lawyerly savvy. The balance of her grades suggest that my evaluation is not an outlier. In the 1L year, Natalie scored extremely well in some classes (especially Torts and our foundational course Elements of the Law). Even when she did not perform quite as well, her grades place him in the stronger tier of her class, albeit not at the very top of the section. On the basis of all of this information, in short I am confident that Natalie would be more than capable of handling the intellectual work of a clerkship, and also that her writing is sufficiently clear and compelling that I would have no concerns about delegating to him on this front.

I should add a word here about Chicago's unusual grading system, and the way in which it enables precise comparisons between our students—but disadvantages them in comparison to students at peer schools. As you may well know, Chicago uses a very strict curve round a median score of 177 (which is a B in our argot). There is rarely any large movement from the median, and any grade above 180 is a rare and admirable one, awarded only to a small slice of any given class. Chicago also grades on a normal distribution, lending additional clarity and focus to its scores. Moreover, because it is on the quarter system, it is possible to be very precise about where a student falls in a class as a whole. We are hence able to very finely distinguish between students at all levels. Given all context, it is worth underscoring that Natalie is a very strong student. She would be picked out as excellent by a more coarse grading system (of the kind used at comparator schools), but the Chicago system allows a very precise evaluation of her areas of strength and relative weakness.

Natalie has achieved this impressive academic record even though she has been working part time through law school. More specifically, she works for a Los-Angeles-based production company reading a novel a week and writing reports on whether the latter could be effectively adapted for film or television. That Natalie has been able to balance this time commitment with her law schoolwork (and in 1L year too!), of course, reflects her time-management skills and more general composure and organizational skills. In addition, Natalie continues to create her own written fiction, often drawing on specific historical themes and incidents. Hence, she has a range of talents and interests broader than that of the modal law student. I think this will make her a very good fit in many judges' chambers—someone who is pleasant to have around, who strengthens the chambers in many different ways,

and who has broad and engaged cultural interests.

In the medium term, I understand that Natalie wants to be a litigator. She has already demonstrated an interest not just in litigation, but in public service. In her first summer of law school, she worked for the civil rights unit in the New Jersey U.S. Attorney's office. She has also been a very strong participant, I understand, in the law school's own police accountability clinic. At the same time, she continues to take advantage of Chicago's distinctively broad and interdisciplinary approach to the law without losing sight of the need to master the doctrine—not just by writing a comment for the Law Review, but also by continuing to take doctrinal classes.

Based on all this evidence, I anticipate that Natalie will perform very well in the demanding circumstances of a federal clerkship. I am very happy to offer my unqualified support for her application. Of course, I would be more than happy to answer any questions you have, and can be reached at your disposal at huq@uchicago.edu (and 703 702 9566).

Kind regards,

Aziz Huq

August 02, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

I am writing to recommend Natalie Cohn-Aronoff for a clerkship in your chambers. Natalie was my student as a 1L in Legislation & Statutory Interpretation at the University of Chicago. Legislation & Statutory Interpretation is a lecture course that is part of the mandatory 1L curriculum. Natalie's exam was among the top handful in her section. That outcome was unsurprising, as Natalie had demonstrated careful reading and comprehension of cases throughout the term along with strong analytical reasoning skills. In a course that dealt primarily with complex problems of statutory interpretation, Natalie toggled easily between the specifics of the problem presented and the more general themes and patterns of argumentation that emerged over the quarter. Those skills were equally evident in Natalie's written exam, which assessed possible student loan actions by the executive under a variety of federal statutes. Natalie's analysis of that problem was careful and systematic, identifying an array of grounds upon which the various policies considered, ranging from a continuing pause on payments to outright cancellation, might be challenged and articulated a range of plausible responses, while at the same time acknowledging the difficulties of the government's position (in the exam, students were asked to write from the perspective of a Department of Justice attorney preparing an objective memo on the matter). Based purely on that performance, I would have great confidence in her ability to prepare top quality bench memoranda and draft opinions.

That confidence is bolstered by Natalie's law review comment, which considers whether the Freedom of Access to Clinic Entrances Act ("FACE") Act might provide protections for individuals seeking access to reproductive healthcare in a post-Dobbs world. Though implemented in response to threatening protests in the immediate vicinity of abortion clinics, Natalie explores the possibility of a more expansive reading of the statute, covering, for example, the use of "WANTED" posters by civilian enforcers of Texas's restrictive abortion law, S.B. 8. While self-consciously exploring more creative or ambitious interpretations of the statute, Natalie's analysis of the FACE Act is careful and sober. She very plausibly identifies the textual basis for these more expansive readings, but also acknowledges their limited scope, and closes with suggestions to Congress to clarify the law in ways that would make those readings less vulnerable to legal objection. All told, Natalie's analysis of the FACE Act is creative while also systematic and honest. Natalie's writing is also clear and concise, making her argument transparent and easy to process. To my mind, these are precisely the virtues of excellent legal writing.

Beyond her narrowly academic performance, I should also mention Natalie's impressive maturity. Throughout the quarter, I came to rely upon Natalie in offering a calm, serious voice in class discussion. Similarly, my conversations with Natalie after and outside of class were always friendly but focused. Even on topics that obviously concerned her normatively, Natalie was always clear-headed and grounded in discussion. (Again, I think this comes through clearly in her law review comment.)

As I hope the above makes obvious, I recommend Natalie highly and without reservation. Natalie would make an excellent law clerk, and any judicial chambers would be lucky to have her. Please feel free to contact me by phone or email if there is any additional information that I can provide.

Best regards,

Ryan D. Doerfler

Ryan Doerfler - doerfler@uchicago.edu

Randal C. Picker
James Parker Hall Distinguished Service Professor of Law
1111 East 60th Street | Chicago, Illinois 60637
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rpicker@uchicago.edu

August 02, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning:

This is a letter of recommendation for the clerkship application of Natalie Cohn-Aronoff, who is currently a second-year student at the University of Chicago Law School. Natalie has a strong record at the Law School and has had a rich, interesting set of experiences. I think that she would make a quite capable clerk and one that you would be happy to have in your chambers.

We will start with the basics. Natalie received a BFA, summa cum laude, in Writing for Screen and Television in May 2020 from the University of Southern California. She also minored in law and public policy. I think USC and NYU are the leading programs in screenwriting and related matters, so I am sure that they get terrific students, which makes Natalie's success in the program that much more impressive. Natalie then went into the industry—initially a position in the mailroom, which seems to be the classic starting spot—and she still works as a reader of screenplays, including some recent work for Apple TV+. All of that is fun, but it also means that Natalie has spent a great deal of time in careful analysis of text and communications. How do words matter and what impact will they have? She continues to do this in a peer screenwriting group. This type of detailed work with texts is a core part of being a judicial clerk, along of course with legal reasoning and analysis.

We should turn to that next. She has a strong Chicago record, where she is a member of The University of Chicago Law Review with a transcript that matches that. Chicago is blessed with quite capable students, so Natalie's success is a meaningful indicator of her real intellectual strengths. Natalie took two of my classes this year, Copyright in the Fall and Antitrust in the Winter. Those are both fairly large, but in both classes, Natalie stood out as a thoughtful, engaged and energetic law student. And those are very different classes. Copyright undoubtedly played to Natalie's background in screenwriting and TV, but Antitrust really was outside of her comfort zone. But she did very well in the class, but perhaps more importantly, demonstrated a thoughtfulness about the material in class and also outside of it during office hours.

Natalie has used her time in Law School to build her legal skills outside of the classroom with a position last summer at the U.S. Attorney's Office in Newark NJ. And this upcoming summer she is splitting her time between Quinn Emanuel and the California Women's Law Center. Those should be impactful, different experiences, the first based in a high-end law firm and the second situated in the world of mission-driven legal advocacy. (Natalie also played hockey at USC, perhaps in preparation for both of those environments?)

Natalie has also been active at the Law School in the many other activities that make the place interesting. Natalie has served as a senior writer on the Law School Musical. Our students take that quite seriously, with an extensive script written by the students with songs based on the hits of the day, and Natalie's role there is a perfect match for her legal and entertainment skills. She is also involved in the Jewish Law Students Association, the American Constitution Society and more. All of that speaks to an ability to work in teams, another key part of a clerkship, but also to work as a leader.

I do think that Natalie is a terrific candidate for a clerkship. A deep experience with writing, clear legal capabilities, and an ability to work in small groups. And I think that she would be fun to have around. I very much hope you will sit down to talk to Natalie to get a better sense of her. And please feel free to reach out to me there is anything else I can do to help with her application.

Sincerely,

Randal C. Picker

WRITING SAMPLE

Natalie Cohn-Aronoff
cohnaronoff@uchicago.edu | 650-740-9109
5454 S. Shore Drive, Apt. 321 Chicago, IL 60615

I wrote the attached and excerpted research paper, *Saving FACE: A Reconsideration of the FACE Act*, as part of my commitments as a staffer on *The University of Chicago Law Review*. This draft incorporates feedback I received from my faculty advisor and my editors primarily during the paper proposal and outlining process. I also received comments on a first draft, mainly regarding structure and further development of sections not included in this sample.

This paper reexamines the FACE Act, a federal statutory protection of abortion access, in light of the constitutional right to an abortion being overturned. The excerpted portion of the paper is preceded by a brief history of a surge in deadly antiabortion violence during the 1990s that led to the FACE Act's enactment. This is followed by a discussion of the current landscape of abortion access, in which a current wave of state laws restricting abortion invites various tactics of abortion interference by private actors. The following excerpt is a statutory analysis of the FACE Act in an effort to untangle the law's potential limits followed by an application of the proposed interpretation to novel strategies by private actors to impede abortion access. Subsequent sections not included in this excerpt discuss potential challenges to the proposed interpretation and propose statutory amendments that would improve the FACE Act's utility given modern technology and the availability of reproductive healthcare beyond brick-and-mortar clinics.

II. THE FACE ACT'S PROTECTIONS AND PRINCIPLES

In the background of FACE's development was a period of antiabortion violence. Bombings, arson, and kidnappings occurred through the 1980s.[1] However, FACE was first conceived in response to a Supreme Court decision that made it more difficult for abortion providers to turn to courts for protection. In 1990, the Fourth Circuit upheld an injunction preventing Operation Rescue and associated antiabortion groups from blocking access to a Virginia abortion clinic under a section of the Ku Klux Klan Act that creates a right of action against conspiracies to deprive individuals of equal protection, finding that the attempt to prevent women from accessing a clinic constituted such a conspiracy.[2] The Supreme Court reversed in Bray v. Alexandria Women's Health Clinic,[3] disputing the notion that the conspiracy was gender-based or distinguished between interstate and intrastate patients. Bray denied abortion providers and patients access to federal injunctive relief, which they had been employing against repeat offenders. Some antiabortion activists "saw Bray as a license to escalate their efforts."[4] As a result of Bray, Representative Chuck Schumer of New York and Senator Ted Kennedy of Massachusetts swiftly began working on legislation to override the decision.[5] The murder of Dr. Gunn gave the passage of FACE more urgency, and the bill passed with bipartisan support in November 1993.[6] President Clinton signed FACE into law in May 1994.[7]

A. Overview of the FACE Act

FACE prohibits three types of activity: "force," "threat of force," and "physical obstruction," with the intent to "interfere with" or "intimidate" a person from "obtaining or providing reproductive health services."[8] The intent requirement can be inferred from a variety of evidence, including "leaflets, pamphlets," "signs," video, photos, "comments posted on social media," "prior interactions with a defendant, and even a defendant's bumper stickers."[9] However, FACE violations are often committed by antiabortion activists who readily admit intent, rendering the production of such evidence unnecessary.[10]

FACE provides several statutory definitions of key terms. "Physical obstruction," per the statute, "render[s] impassable ingress to or egress from" a reproductive health provider, or "render[s] passage to or from such a facility…unreasonably difficult or hazardous."[11] To "interfere with" is "to restrict a person's freedom of movement,"[12] and to "intimidate" is "to place a person in reasonable

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[1] Evelyn Figueroa & Mette Kurth, Madsen and the Face Act: Abortion Rights or Traffic Control?, 5 UCLA WOMEN'S L.J. 247, 247–48 (1994).

[2] Linda Greenhouse, Supreme Court Says Klan Law Can't Bar Abortion Blockades, N.Y. TIMES, Jan. 14, 1993, https://perma.cc/4FLF-8TLH.

[3] 506 U.S. 263, 264 (1993).

[4] Figueroa & Kurth, supra note 1, at 248.

[5] Linda Greenhouse, Supreme Court Says Klan Law Can't Bar Abortion Blockades, N.Y. TIMES, Jan. 14, 1993, https://perma.cc/4FLF-8TLH.

[6] Kevin Merida, House Approves Bill to Combat Violence at Abortion Clinics, WASH. POST, Nov. 19, 1993, https://perma.cc/6XWJ-9LJU; Roll Call Vote on Passage of the Bill S. 636, 103rd Cong. (1993).

[7] Abortion Clinic Access Bill Signing, C-SPAN. 8:01. May 26, 1994.

[8] 18 U.S.C. § 248(a)(1).

[9] Sanjay Patel, FACE Off with Anti-Abortion Extremism - Criminal Enforcement of 18 U.S.C. § 248 (FACE Act), 70 DEPT. J. FED. L. & PRAC. 277, 281 (2022).

[10] Id.

[11] 18 U.S.C. § 248(e)(4).

[12] 18 U.S.C. § 248(e)(2).

apprehension of bodily harm."[13] FACE protects "reproductive health services,"[14] including both abortion providers and antiabortion pregnancy centers, as well as "religious worship" institutions.[15]

FACE creates both criminal[16] and civil[17] causes of action. The Department of Justice prosecutes criminal FACE Act cases, but civil cases may also be brought by "private persons involved in providing or obtaining reproductive healthcare services" as well as state attorneys general.[18] Enforcement of FACE has varied; the statute fell into obscurity under the Bush administration, during which criminal enforcement of FACE declined by over 75%,[19] likely due to the administration's association with and support for the antiabortion movement.[20]

The statute creates different criminal penalties, which vary according to the number of offenses and if injury or death occurs.[21] For first offenses, an offender may receive either jail time or a fine; for subsequent offenses, penalties are steeper and both may imposed. Private plaintiffs in civil cases may seek injunctive relief or statutory damages.[22]

FACE has "repeatedly survived"[23] constitutional challenges in every circuit that has considered it. Circuit courts have, however, reached this conclusion in different ways. Most have held that because abortion clinics have "a number of patients and staff who do not reside" in the state in which they practice, those individuals "engage in interstate commerce when they obtain or provide reproductive-health services" and therefore fall within Congress' Commerce Clause purview.[24] Other circuits have found an interest in preserving "the availability of abortions nationwide" as the source of Congress' authority to regulate.[25]

B. Textual Analysis

Actionable conduct under FACE must be either "force," a "threat," or "physical obstruction," so it is imperative to define these terms. A substantial body of law defines "force" and "threat," while "physical obstruction" is more nebulous and can apply to a broader category of interference.

1. "Force" and "threat of force."

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[13] 18 U.S.C. § 248(e)(3).

[14] 18 U.S.C. § 248(e)(5).

[15] 18 U.S.C. § 248(a)(2).

[16] 18 U.S.C. § 248(b).

[17] 18 U.S.C. § 248(c).

[18] Patel, supra note 9, at 281.

[19] Daphne Eviatar, Abortion clinic violence prosecution cratered under Bush Administration, COL. INDEP., June 12, 2009, https://perma.cc/49S8-UNY5.

[20] Michelle Goldberg, How George Bush will ban abortion, SALON, Nov. 13, 2003, https://perma.cc/GK6M-2KE3.

[21] 18 U.S.C. § 248(b).

[22] 18 U.S.C. § 248(c)(1)(B).

[23] Neelam Patel, Emma Dozier, Isabella Oishi, & Ellie Persellin, Abortion Protesting, 23 GEO. J. GENDER & L. 121, 123 (2022).

[24] United States v. Dinwiddie, 76 F.3d 913, 919 (8th Cir. 1996). See also United States v. Gregg, 226 F.3d 253, 261 (3d Cir. 2000); United States v. Weslin, 156 F.3d 292, 296 (2d Cir. 1998); Hoffman v. Hunt, 126 F.3d 575, 583 (4th Cir. 1997).

[25] Terry v. Reno, 101 F.3d 1412, 1417 (D.C. Cir. 1996) (emphasis omitted); see also United States v. Wilson, 73 F.3d 675, 682 (7th Cir. 1995) (finding that a "substantial threat to the national reproductive health services market… distinguishes Congress's authority to regulate").